No. 863

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JOHN F. DAVIS, CL

In the Supreme Court of the United States

OCTOBER TERM 1966

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

Jurisdictional Statement

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Jurisdictional Statement

I.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of California, entered on June 6, 1966, setting aside the judgment of the District Court of Appeal, Third Appellate District, and affirming the judgment of the trial court. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

II.

OPINION BELOW

The opinion of the Supreme Court of the State of California is reported in 64 Advance California Reports 773, 414 P. 2d 820, 51 Cal. Rptr. 524. The opinion of the District Court of Appeal, Third Appellate District, is reported at ..... Cal. App. 2d ....., 46 Cal. Rptr. 653. Copies of the letter opinion and the judgment of the trial court, the opinion of the District Court of Appeal, as modified, and the opinion of the California Supreme Court, including the dissenting opinion, are attached hereto as Appendix A.

III.

JURISDICTION

This suit was brought before the Superior Court, State of California, to seek a refund of taxes paid under California Revenue and Taxation Code, sections 6001 et seq. The judgment of the trial court denying the refund was at first reversed by the District Court of Appeal, but this reversal was subsequently vacated by the decision of the California Supreme Court which affirmed the judgment of the trial court. The judgment of the California Supreme Court was filed on June 6, 1966, and notice of appeal was filed in that court on August 31, 1966. By order of the California Supreme Court, the time for docketing the case was extended to December 15, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583 (1954); *Freeman v. Hewit,* 329 U.S. 249, 91 L.Ed. 265 (1946); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 91 L.Ed. 80 (1946).

IV.

QUESTIONS PRESENTED

1. May the State of California impose a gross receipts tax on sales of fuel oil which is sold for consumption by ships of foreign and domestic registry as they ply the high seas carrying export cargo to foreign ports?

2. Is fuel oil which is delivered aboard ships of foreign (or domestic) registry for consumption as they ply the high seas to foreign ports an "export" immune from state taxation under the Federal Constitution?

3. Does the constitutional prohibition against state taxation of "exports" apply only where it is proved that the commodity is landed or off-loaded in a foreign country, or is it enough that the commodity leaves the United States with assurance of non-return?

4. Is the purchase and consumption of fuel oil aboard ships of foreign (or domestic) registry engaged in transporting export cargo across the high seas to foreign ports a part of the "process of exportation" protected against state taxation by the Federal Constitution?

5. Where fuel oil is sold and delivered aboard ships of foreign (or domestic) registry for consumption while they are engaged in transporting cargo in interstate and/or foreign commerce, does a tax on the sale:

A. Constitute an unconstitutional burden on such commerce; or

B. Constitute a conflict with existing federal regulations, which "occupy the field" of taxation of fuel oil sold for consumption by ships engaged in foreign or intercoastal commerce, and impliedly prohibit state taxation of such sales?

V.

STATUTES INVOLVED

The relevant statutes are as follows: sections 6051, 6052, and 6352, California Revenue and Taxation Code; 19 U.S.C. 1309 and 26 U.S.C. 3451 (now 26 U.S.C. 4221). These statutes are set forth in Appendix B hereto.

VI.

STATEMENT

Appellant (hereinafter referred to as Shell) is in the business of selling fuel oil on a world-wide basis to ocean-going ships engaged in transporting cargo in international trade. Shell maintains fueling facilities at ports throughout the world, and offers this service on a continuing basis. In 1950 Shell, through its delivery facilities located at various California ports, delivered fuel oil to several different ships which may be categorized as follows:

Ships registered in foreign countries and engaged exclusively in foreign commerce;*

Ships registered in the United States and engaged exclusively in foreign commerce;† and

Ships registered in the United States and engaged in interstate commerce.‡

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*On August 15, 1950, Shell loaded fuel oil at Martinez, California, on board the Canadian vessel *SS World Trotter*, which was laden with cargo bound for and subsequently delivered to Keelung, Formosa, and Yokohama, Japan.

†On September 29, 1950, Shell loaded fuel oil at Wilmington, California, on board the American vessel *SS A. G. Brown*, which was laden with cargo bound for and subsequently delivered to Cristobal, Panama Canal Zone.

‡On July 9, 1950, Shell loaded fuel oil at Wilmington, California, on board the American vessel *SS Five Forks*, which was laden with cargo bound for and subsequently delivered to New York, New York.

The deliveries to each of these ships were made pursuant to certain written agreements which were all executed outside California. Under the procedure prescribed in these agreements, the owner and/or operator of the ship was required to cable Shell in New York or Ontario, Canada, or its agent at the fueling port, at least fourteen days in advance of the ship's arrival in the port, and to specify the estimated time of arrival in port and the quantity of fuel needed. Upon arrival of the ship in port, it loaded the amount of fuel ordered either from a fueling dock or barge. The invoice for the fuel was thereafter submitted either to the ship's captain or to its owner and/or operator, which in two cases at least were in foreign countries (namely, the *SS World Trotter* and the *SS Panagiotis Coumantaros*). Added to each invoice was the California sales tax. The tax was paid to Shell by the ship owner or operator, and Shell in turn paid it over to the state tax authorities.

Each ship involved herein loaded cargo at the port at which it took on fuel oil, and then sailed to its next port of call, where it discharged the cargo. None of the ships discharged any cargo in California after fueling. And, in the case of the foreign ships, all cargo loaded in this country was delivered to a foreign port.

All of the fuel oil loaded on board each ship was consumed on the high seas, while the ship was engaged in carrying goods in foreign (or interstate) commerce. Without this fuel, none of the ships could have moved from California.

Shell now seeks a refund of the tax collected and paid with respect to the sales of fuel oil made to each of these ships. Shell has agreed to return any refund that it receives to the ship owners or operators from whom it was originally collected.

The federal questions were raised in the trial court by the complaint for refund filed by Shell. The complaint sought a refund of taxes levied and collected with respect to sales of fuel oil to ships engaged in interstate and foreign commerce, on the grounds that the imposition and/or collection of the tax was repugnant to the Federal Constitution, citing Article I, Section 8, Clause 3, and Section 10, Clause 2, and Article VI, Clause 2. The trial court entered judgment denying the refund, and the appeal taken therefrom was based upon the contentions that the trial court had erroneously sustained the validity of the taxing statute in the face of the constitutional prohibitions upon taxation of exports and of foreign and interstate commerce. The District Court of Appeal, in a unanimous decision, reversed the judgment of the trial court with respect to the ships carrying export cargo (namely, the *SS World Trotter* which sailed from California to Keelung, Formosa), and struck down this application of the sales tax, as repugnant to Article I, Section 10, Clause 2. It otherwise affirmed the judgment of the lower court. Thereafter, the California Supreme Court granted a hearing, and, with one justice dissenting, set aside the opinion of the District Court of Appeal and held that the taxing statute did not violate any provision of the Federal Constitution.

VII.

THE QUESTIONS ARE SUBSTANTIAL

The issues raised in this appeal involve a tax placed on goods of domestic origin precisely as they leave the United States for entry into the world economic market. The burden imposed by this tax is of fundamental importance to the shipping industry and to the nation's multimillion dollar trade in ships' stores.

Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Federal Constitution prohibits the

imposition of such a burden by the individual states. This prohibition was originally enacted (and has since been enforced), both to assure that the interior states would have equal opportunity with the seaboard states to participate in foreign trade free of local impediments, and to prevent a local diversity of taxes and regulations damaging to the entire country. The location of the seaboard states obviously puts them in a favored geographical position to erect a "toll-gate" or "turnstile" through which foreign commerce must pass, and thus to control and to exact revenue from that commerce for their exclusive benefit. Such practices, while profitable for the seaboard states, not only discriminate against the commerce of the interior states but also create the prospect of a variety of confusing and conflicting local controls which the Constitution was specifically designed to eliminate.

The decisions of the Supreme Court have consistently and repeatedly invalidated state taxes of every type which had the effect of erecting an economic barrier to the movement of export cargo enroute through the seaport to a foreign destination. The judgment of the California Supreme Court is in direct conflict with the holdings of these decisions, with the policy which underlies the Imports-Exports Clause, the Commerce Clause, and relevant federal statutes, and with the holding of *Gulf Oil Corp. v. McGoldrick*, 281 N. Y. 647, 22 N.E. 2d 480 (1939), *as modified*, 282 N. Y. 612, 25 N.E. 2d 392 (1940), *aff'd*, 309 U.S. 414, 84 L. Ed. 840 (1940).

1. Fuel Oil Purchased for Consumption by Vessels Bound for Foreign Ports Is an "Export" Protected by the Import-Export Clause from Levy of a State Sales Tax.*

The *SS World Trotter*, a vessel operated by a Canadian corporation, registered under the laws of Canada and fly-

*This section relates to sales of fuel oil to foreign and domestic vessels engaged in foreign commerce.

ing the Canadian flag, purchased a supply of fuel oil, an indispensable ships' store, at Wilmington, California, title and possession vesting in the Canadian purchaser as the fuel was pumped aboard. The vessel then sailed, loaded with an export cargo, for Keelung, Formosa. If the fuel oil had been carried as cargo, consigned to an individual at Formosa, the sale would clearly have been exempt from tax as an export. (Article I, Section 10, Clause 2 of the Constitution provides "No State shall . . . lay any Imposts or Duties on Imports or Exports . . ."; *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80 (1946).) Because the fuel oil was purchased for consumption on board the vessel, the court below has ruled that the commodity was not an export and not protected from tax by the Constitution.

By this distinction the court below has justified a turnstile tax that has exacted several millions of dollars in tribute (Respondents' Petition for Hearing, California Supreme Court, p. 38, n. 11) from goods of domestic origin for the privilege of passing out of the United States into the world beyond. The Supreme Court has never held that a commodity can be an "export" under the Constitution *only if* it arrives in a foreign country. Such a distinction finds no justification in the objectives sought by the draftsmen of the Constitution or in the collateral authorities in the field. Furthermore, the California Supreme Court decision is contrary to *Gulf Oil Corp. v. McGoldrick, supra*, 282 N. Y. 612, in which the New York Court of Appeals, on similar facts, held that a sales tax on fuel oil sold as ships' stores was prohibited, *inter alia*, by the Import-Export Clause of the Federal Constitution. (*Aff'd on another ground*, 309 U.S. 414.)[1]

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1. The unofficial report of the *Gulf Oil* case, *supra*, which appears at 25 N.E. 2d 392, is incomplete. It fails to indicate that the affirmance by the New York Court of Appeals was on the grounds of Article I, Section 10, Clause 2 and Article VI, Clause 2 of the Federal Constitution.

Numerous authorities have indicated that the exports clause was adopted to prevent the "mercantile" (seaboard) states from exacting a tribute from merchandise passing through their harbors and into the stream of world commerce. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 19 L.Ed. 382, 386 (1869); *Richfield Oil Corp. v. State Board of Equalization, supra*, 329 U.S. 69, 76; 2 Farrand, *Records of the Federal Convention*, 305-308, 358-363, 441-443. Under the Confederacy the individual states had reserved control over commerce. (Morison, *The Oxford History of the American People*, 279; *Articles of Confederation* 1777, Article IX.) Reassignment of this power to the Federal Government was one of the major innovations of the Constitution. (Morison, *op. cit.*, 310; *The Federalist No. 45* (Wesleyan University Press Ed. 1961), 314.) The newly independent nation had quickly learned both the perishable quality of its foreign trade and the importance of that trade to the welfare of the nation. (Morison, *op. cit.*, 282-283, 313, 314; Farrand, *The Development of the United States*, 67; 1 Bancroft, *The Constitution of the United States*, 186.) The total elimination of state controls on exports was believed a necessary remedy for the national ills previously suffered.

In the instant case, two types of commodities were loaded aboard the *SS World Trotter* at a California port: cargo consigned to buyers in Formosa and fuel oil to be consumed on the voyage to Formosa. Each of these commodities had to pass through the port and on to the ship in the same way. Each originated in the domestic economy and was irrevocably committed to leave the United States. ". . . [N]othing equivocal in the transaction . . . created even a probability that the oil would be diverted to domestic use." *Richfield Oil Corp. v. State Board of Equalization,*

supra, 329 U.S. at 83.[2] Each commodity was sold to a foreign purchaser in the course of international trade. In each case, the opportunity of the state to obstruct or interfere with that trade occurred at the port. In terms of the impact upon our foreign trade, nothing distinguishes the Formosan consignee from the Canadian ship operator: each purchased a commodity for removal from the United States economy; each purchaser uses the commodity beyond our shores; each utilizes the mechanics of foreign exchange to pay for the commodity, thus affecting our balance of payments; and each will purchase elsewhere if the price of the commodity becomes uncompetitive by reason of high taxes. If the sale to the Formosan consignee cannot be taxed as an "export," and it clearly cannot (*Richfield Oil Corp. v. State Board of Equalization, supra*), then nothing in the logic of the constitutional prohibition permits taxation of the sale to the Canadian vessel operator. *Gulf Oil Corp. v. McGoldrick, supra*, 282 N.Y. 612.

Two of the principal cases in this field cited by the court below to support its conclusion that the sale is taxable, are in fact irreconcilable with that conclusion. The *Richfield* case, *supra*, is cited as requiring "a destination in a foreign country." In its discussion of the law that opinion did not once make such a reference. On the contrary, the Court actually said that the cargo was "sold for shipment abroad" (329 U.S. at 78); that the ship was "to carry the oil abroad" (at 82); and that "nothing . . . created even a probability that the oil would be diverted to domestic use" (at 83). The Supreme Court was clearly concerned only with the dispatch of oil into the world market outside of the United States and with the assurance of its irrevocable diversion from the United States economy.

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2. In fact such fuel is subject to confiscation if taken off the vessel at a United States port, 46 U.S.C. 883.

The California Supreme Court decision in *Matson Nav. Co. v. State Board of Equalization*, 136 Cal. App. 2d 577, 289 P.2d 73 (1955), applied the same test. Therein the court refused to permit a tax upon the sale of an ocean-going vessel, the *SS Matsonia*, to a Panamanian company. The exchange of title and possession occurred in California. It was in fact a practical impossibility that the vessel could ever come to rest in the foreign country, that is, in the sense of being off-loaded and combined with the goods of that country. Yet the court was undisturbed by this obvious fact. In its own statement of the issues before it the court mentioned only that the sale was to a "foreign purchaser for use in international trade" and did not even mention a foreign destination. (289 P.2d 75.) The court held that the vessel was an export because it "was irrevocably committed to foreign trade." (289 P.2d 77)

The court below refers to three cases (*Alaska v. Arctic Maid*, 366 U.S. 199, 6 L.Ed.2d 227 (1961); *Dooley v. United States* 183 U.S. 151, 46 L.Ed. 128 (1901); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 19 L.Ed. 383 (1869)) including language which might imply that exportation involves delivery in a foreign country. A careful reading of these cases, however, discloses that each case involved only domestic commerce. "Exports" were mentioned only to contrast them with commodities delivered in a *state* or *territory*. Refinements within the field of *foreign trade* such as herein presented were not considered. Distinctions which were not considered or intended by the court should not be attributed to its general language. (*Woodruff v. Parham*, 75 U.S. 123, 148.)

One case cited below (*Swan and Finch Co. v. United States*, 190 U.S. 143, 47 L.Ed. 984 (1903)) does in fact contain the statement that an "export" must be landed in a

foreign country. *The Swan and Finch case is not a constitutional law case and is not a binding precedent on this court.* The *Swan* case involved an *import* duty. A "drawback" of a prior customs duty was granted by statute when goods of foreign origin were processed domestically and later "exported." The petitioner was seeking to bring the sale of such an article, fuel oil destined for consumption at sea, within the definition of "export," as used within the *drawback statute,* so as to secure a refund of the import duty only. The court gave several compelling reasons for denying the drawback under such circumstances.

Although no constitutional issue had been raised, the court made the gratuitous and uncalled for remark that the word "export" as used in the Constitution and laws of the United States "*generally* means transportation of goods from this to a foreign country." (190 U.S. at 145.) (Emphasis added.) This is true: generally all exports *do* go into a foreign country. *Stores for ships and airplanes are almost the only special cases.* Where special circumstances exist, this Court is alert to observe them and to accord them the relevance they deserve (*e.g., Hoover & Allison Co. v. Evatt,* 324 U.S. 652, 89 L.Ed. 1252 (1945), and *Gulf Fisheries v. Darrouzet,* 17 F.2d 374 (D.C. 1926), deciding that an "import" need not come from a foreign country). The logic and the historical meaning of the Import-Export Clause in the Constitution were not involved, nor were they even discussed or alluded to in the *Swan* case.

The foregoing analysis applies to ships of all nations engaged in foreign trade. Foreign ships, however, have a special advantage, for fuel they buy does have a destination "in" a foreign nation for all purposes of any significance to this issue. The fuel oil comes within a foreign dominion as soon as it is pumped on board. The internation-

ally recognized rule of law (*The Lotus,* Decision of Permanent Court of International Justice, 1927, Series A No. 10, Series C No. 13) which extends the jurisdiction of a country to the "internal economy" of the ships which fly its flag is characterized by the court below as a "fiction." (App. A, p. 27.) It is admittedly a "fiction" to view a foreign flag vessel as a territorial extension (6 Webster's Works, 306-307) of the country whose flag it flies, but this is a valid metaphorical expression to describe the jurisdictional powers possessed by the country of registry. Restatement, *Conflicts of Law,* 405. When a seaman steps on board a vessel of foreign registry berthed in a United States harbor, he enters the jurisdiction of the flag and immediately becomes "subject to all its obligations and liabilities." *Rainey v. New York and P.S.S. Co.,* 216 F. 449, 454 (9th Cir. 1914). This case, and the many others upholding the validity of the jurisdiction of the nation's flag (*Old Dominion SS Co. v. Gilmore,* 207 U.S. 398, 52 L.Ed. 265 (1907); *Scandinavian Airlines System, Inc. v. County of Los Angeles,* 56 Cal.2d 11, 363 P.2d 25 (1961)), leave no doubt that such nation could control fuel oil the instant it is loaded, so that it could tax the fuel, forbid its purchase, or exercise any of the other prerogative of sovereignty which arise from an article being physically located in a foreign country.

The court below falls into a curious error in purporting to correlate the meaning of the words "import" and "export," again citing a case involving only domestic commerce. (See *Dooley v. United States, supra;* App. A, p. 25.) The proper symmetry of the correlation is this: if "import" means "brought into the country" irrespective of origin, then "export" should mean "sent out" irrespective of destination. The symmetry is destroyed by the court's incorrect

assumption that an "import" must come *from* a foreign country. It need not do so. Fish harvested at sea and brought into this country are "imports." *Booth Fisheries Corp. v. Case,* 182 Wash. 392, 47 P.2d 834 (1935); *Gulf Fisheries Co. v. Darrouzet, supra.* Goods leaving this country and consumed at sea are the exact opposite.

2. A Tax on the Sale of Fuel Oil, Sold for Consumption Aboard Vessels Carrying Only Export Cargo, Falls on the Tax-Immune "Process of Exportation."*

The Supreme Court long ago confirmed that the Import-Export Clause is not limited merely to prohibiting a tax on the exported article itself. The prohibition reaches further. It applies to immunize from taxation the whole "process of exportation" (*Empresa Siderurgica v. County of Merced,* 337 U.S. 154, 93 L.Ed. 1276 (1949)), that is, to all of the transactions, documents and activities which are necessary, in a commercial and in a physical sense, to transport the exported goods overseas. Unlike interstate commerce, the "process of exportation" cannot be made to pay its own way. *Richfield Oil Corp. v. State Board of Equalization, supra,* 329 U.S. at 75-76. The prohibition against state taxation is absolute; otherwise, the protection given to "exports" would be a nullity.

In early exportation cases, the Supreme Court applied a strict *economic burden test.* It suggested that *any tax* which was likely to have the effect of increasing the cost of "exportation" (or its logical corollary, "importation") violated the Import-Export Clause. This idea was first suggested in *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 (1827), where the court struck down a tax on the occupation of importation as *in substance* a tax on the imported

*This section relates to sales made to foreign vessels and to domestic vessels engaged in foreign commerce.

goods themselves. (12 Wheat. at 445.) Later, in *Fairbank v. United States,* 181 U.S. 283, 45 L.Ed. 862 (1901), the Supreme Court nullified a tax on bills of lading covering goods exported in foreign commerce, on the ground that the Constitution required *"a freedom from any tax which directly burdens the exportation."* (181 U.S. at 293.) (Emphasis added.) Thereafter, this same economic burden test was again applied to invalidate a tax on the purchase of insurance policies covering the marine transit of exports, as being "as much a burden on exporting as if it were laid on the charter parties, the bills of lading or the goods themselves." *Thames and Mersey Marine Ins. Co. v. United States,* 237 U.S. 19, 27, 59 L.Ed. 821 (1915).

The test has received its broadest application in *United States v. Hvoslef,* 237 U.S. 1, 59 L.Ed. 813 (1915), where the Court had before it a tax levied on the purchase of a ship charter covering an ocean-going vessel engaged in export trade. The charter was characterized as a lease of the vessel for a voyage to carry cargoes of goods to foreign ports. The Court rejected the tax as "in substance a tax on the exportation." (237 U.S. at 17, 18.)

More recently, in *Canton R.R. Co. v. Rogan,* 340 U.S. 511, 95 L.Ed. 488 (1951), the Supreme Court refused to apply the economic burden test as the sole criterion of immunity. There the court considered a tax on the gross receipts of a railroad engaged in hauling exports to the dock, from where they were eventually loaded on board a carrier for shipment overseas. Concerned that the economic burden test was too broad if applied to transportation of exports *prior to embarkation and prior to the overseas voyage,* the Court indicated that if this were the *only* test it would create a zone of immunity leading "back to every forest, mine and factory in the land." (340 U.S. at 515.)

To avoid such a result, the court imposed for the first time a *spatial limitation* on the economic burden test. "Exportation" by the Court's definition, begins and ends at the "water's edge." (340 U.S. at 515.) Any activity leading *up to the dock* was not within the "process of exportation"; *the necessary and logical corollary is that activities and transactions covering the exports after embarkation are immune.* Thus, the tax in the *Canton* case was easily valid, even though an economic burden, because it fell on proceeds derived from transporting the cargo prior to embarkation.

It is imperative to recognize that the *Canton* decision *did not* purport to impair or undermine the economic burden test utilized by the Supreme Court in the earlier "exportation" cases. It simply halted the further extension of the economic burden test to activities and transactions leading up to overseas shipment of exports. Properly interpreted, it means that "exportation" is limited to transactions, documents and activities indispensable to and embraced within the overseas voyage.

By both the economic burden test and the spatial test, the present tax, applied to sales of fuel oil to foreign-bound ships, invades the immunity created by the Import-Export Clause. The economic impact of the tax falls on the operator of the vessel, since either as a result of business practice or state law (California Rev. and Tax. Code, section 6053) the oil company adds the amount of the sales tax to the invoice price of the fuel oil. See *Richfield Oil Corp. v. State Board of Equalization, supra,* 329 U.S. at 84-85; *cf. Clary v. Basalt Rock Co.,* 99 Cal. App. 2d 458, 461-462, 222 P.2d 24 (1950); *Roth Drug, Inc. v. Johnson,* 13 Cal. App. 2d 720, 736, 57 P.2d 1022, (1936). It is the practical operation of the tax that counts. (*American Oil Co. v. Neill,* 380 U.S. 451, 455, 14

L.Ed. 1 (1965).) The fuel oil is purchased for consumption by vessels while transporting exports—as such, the fuel is a prime and indispensable part of the voyage. The operator of the vessel cannot move the vessel or its cargo to a foreign port without paying the added cost of the tax. In essence, it is a cost he pays for the ocean voyage. The greater the volume of cargo, and the longer the voyage, the more fuel the operator must purchase and the more tax he must pay. The state performs no function with respect to the ocean voyage, and has no interest in it. Yet, the measure of the state's revenue is directly related to the length of the voyage. The operator must of necessity pass the economic burden of the tax on to the exporters, each bearing a share proportioned on the basis of the volume or weight of its cargo and the distance of the transportation. The economic burden of the tax cannot be escaped. In substance, it constitutes nothing other than a levy on the ocean transportation of export cargo.[3]

Furthermore, qualification under the spatial test of the *Canton* case is equally clear. The purchase of the fuel oil admittedly occurred in California before the vessel departed from the state. But so did the purchase of the bill of lading (*Fairbank v. United States, supra*), the marine in-

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3. As a further means to protect foreign commerce from state exactions, the Federal Constitution prohibits the states from imposing a duty of tonnage. Article I, Section 10, Clause 3, provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage . . ." This precludes any tax upon the vessel as a charge for "entering or leaving a port." (*United States v. Hvoslef, supra*, 237 U.S. at 17.) If a tax proportioned on the basis of the tonnage of the vessel cannot be imposed, then the present exaction on the vessel operator, proportioned to the length of the voyage, should likewise be invalid. In terms of their interference with foreign commerce, the two taxes cannot be distinguished. See *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 363 P.2d 25 (1961); see also *Hays v. Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855) (prohibiting property tax on foreign vessels).

surance policy (*Thames and Mersey Marine Ins. Co. v. United States, supra*), and the vessel charter for the transoceanic voyage (*United States v. Hvoslef, supra*), occur before the vessel departed from the state. The point at which the purchase occurs is irrelevant; it is the *subject* of the purchase which is important. If it relates to and is an indispensable part of the *overseas shipment,* it is exempt. The fuel oil here was purchased for consumption on the overseas voyage. It was consumed after the export cargo had been loaded aboard the vessel, and was used to transport the cargo overseas to its foreign destination. Its use and application was solely to move export cargo after it had crossed the "water's edge."

The California Supreme Court erred in ruling that the fuel oil was "distinct and separable from the articles of export," and that it was therefore taxable. (App. A, p. 32.) The test is not whether the fuel oil was distinct and separable from the articles of export. *The true test is whether or not the fuel oil is necessary and indispensable to the overseas voyage of the article of export.* A charter of a ship (*United States v. Hvoslef, supra,* 237 U.S. at 17-18) is "distinct and separable from the articles of export"; it covers a single vessel upon which hundreds of different articles may be carried. A single charter may be purchased to move a whole shipload of cargo from a domestic to a foreign port (just as the fuel oil), *and the charter itself has no direct relation to any single item of cargo.* Yet the purchase of the charter cannot be taxed because it is an indispensable part of the overseas transportation of exports, and therefore cannot be subjected to an economic burden. The fuel oil is no less indispensable to exportation and must therefore be given like immunity.

3. A Tax on the Sale of Fuel Oil to Vessels Engaged in Foreign and Interstate Commerce Imposes Direct and Multiple Burdens in Violation of the Commerce Clause of the Federal Constitution.*

Characterization of the sales of fuel oil as interstate and foreign commerce cannot be disputed under these facts: (1) Execution of the contract of sale outside the state of California (Clerk's Transcript, p. 18); (2) remittance of the purchase price made from and received at a point outside California (Clerk's Transcript, pp. 20-21); and (3) delivery of the fuel in California (Clerk's Transcript, p. 16). Sales made under such circumstances touch more than one state, thus raising the possibility of multiple taxation.

Furthermore, since ocean-going vessels are, for purposes of dominion and taxation, treated as ambulatory extensions of the state of their registry, taxation of the vessel and its stores, including fuel oil, may be imposed at any time by the state of the vessel's registry, irrespective of the physical location of the vessel. *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855); *cf., Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 363 P.2d 25 (1961) (applying the same rule to foreign aircraft). As a result, delivery of the fuel aboard each of the vessels simultaneously exposed it to taxation by the state of the vessel's registry. The tax could take the form of a use tax (*Monomotor Oil Co. v. Johnson*, 300 U.S. 86, 78 L.Ed. 1141 (1934)), a property tax (*Brown v. Houston*, 114 U.S. 622, 29 L.Ed. 257 (1885)), or a sales tax (*McGoldrick v. Berwin-White Coal Mining Co.*, 309 U.S. 33, 84 L.Ed. 565 (1940)).

Where a transaction is exposed to the possibility of multiple taxation, the Supreme Court has interpreted the

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*This section relates to sales made to all of the vessels involved herein.

Commerce Clause to prohibit *any taxation whatsoever.* There is no necessity for proving that multiple burdens are in fact imposed.

> "[The] unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, *and not on the contingency that some other state may first have subjected the commerce to a like burden.*" (*Gwin, White & Prince v. Henneford,* 305 U.S. 434, 440, 83 L.Ed. 272 (1939).) (Emphasis added.)

See also *Freeman v. Hewit,* 329 U.S. 249, 252, 91 L.Ed. 265 (1946); *Gulf Oil Corp. v. McGoldrick, supra,* 282 N.Y. 612; *City of Philadelphia Tax Review Board v. Norton, Lily & Co.,* 189 Pa. Super. 91, 149 A.2d 672 (1959), *aff'd,* 157 A.2d 60. See, Comment, 73 HARV. L. REV. 586 (1960).

The California Supreme Court relied upon several cases which involved purely *intrastate* activities (such as withdrawal of fuel from storage). Such cases did not raise the possibility of multiple taxation, and therefore are not applicable precedents. *Eastern Air Transport v. Tax Commission,* 285 U.S. 147, 76 L.Ed. 673 (1932); *Edelman v. Boeing Air Transport,* 289 U.S. 249, 77 L.Ed. 1155 (1933).

The lower court also suggested that the recent case of *General Motors v. Washington,* 377 U.S. 436, 12 L.Ed.2d 430 (1964), holds that the abstract possibility that duplicative taxes might be levied by another jurisdiction is irrelevant. In view of the firm language to the contrary in *Gwin, White & Prince v. Henneford, supra,* 305 U.S. at 440, and *Freeman v. Hewit, supra,* 329 U.S. at 252, this cannot be a correct interpretation of the Supreme Court's position. Such an interpretation would mean that taxes long prohibited by the Supreme Court would now be allowed. *E.g., J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 82 L. Ed. 1365 (1938); *Gwin, White & Prince v. Henneford,* 305 U.S. 434, 83 L.Ed. 272 (1939); *Crew & Levick Co. v. Penn-*

sylvania, 245 U.S. 292, 62 L.Ed. 295 (1917); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 933 (1947). Clearly, the Supreme Court intended no such result.

4. Federal Regulations Occupying the Field of Taxation of Fuel Oil Sold for Consumption by Vessels Engaged in Foreign Commerce Impliedly Prohibit State Taxation.*

Federal tax statutes and federal regulations relating to fuel sold for consumption on ships engaged in foreign commerce all exempt such fuel (and other ships stores) from direct taxation, treating it in every instance as an "export" from the United States. Research discloses no contrary expression of intent by the legislative or executive branches of the Government. In fact, so diligently has Congress protected fuel oil from taxation that it *reversed* the earlier-mentioned *Swan & Finch Co. v. United States, supra* (when that decision ruled that fuel oil sold as ships' stores was not an "export"). In response to the decision Congress adopted a new enactment expressly providing that fuel oil sold as ships' stores is to be exempt as an "export." (19 U.S.C. 1309, as amended; section 630 of the Internal Revenue Act of 1932, now 26 U.S.C. 4221, as amended.) This has remained the congressional policy.

The principal federal regulations are: 19 U.S.C. 1309, exempting from import duty fuel oil imported in bond, retained in bond and sold out of bond for use as stores for ships in foreign commerce; 26 U.S.C. 4221, exempting from federal manufacturers' excise tax fuel oil sold for use as stores for ships engaged in foreign commerce.[4] T.D. 6344, 1959-1 Cum. Bul. 776 further imple-

*This section relates to sales of fuel oil to foreign and domestic vessels engaged in foreign commerce.

4. This exemption appeared in 26 U.S.C. 3451 at the time of the imposition of the tax in this case. The text of section 3451 is set forth in Appendix B of this brief.

ments this policy. S.T. 886, 1939-2 Cum. Bul. 387 is even more striking evidence. There the Internal Revenue Service determined that a federal excise tax on bituminous coal (which is also used as fuel) was *impliedly* limited, not by the specific statutory exemption, but by the general and comprehensive *policy* of the Federal Government against taxation of ships' stores.

The Federal Executive has taken a similar view. In situations where an export license is required for a ship's cargo, one is also required for its fuel,[5] and fuel oil is required to be entered on the ship's outward foreign manifest.[6]

The leading authority in this field is *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84 L.Ed. 840 (1940). In that case the Court held that the federal policy *impliedly* prohibited a local sales tax on sales of fuel oil for use as ships' stores, on the ground of federal occupation of the field. The relevant facts in the *Gulf Oil* case, *supra*, are identical to the facts of this case except in one respect: the fuel oil in that case had been imported in bond, free of customs duty, refined in bond and sold out of bond, whereas the present case involves *domestic* fuel. A detailed study of the federal policy shows that this difference is irrelevant and that the tax presented in this case is also impliedly forbidden.

Consider first the statutory scheme. The federal authorities cited above include two statutes specifically exempting ships' stores from federal taxation. The statute found in Title 19 (Customs Code) exempts fuel oil from import duty, by granting a "drawback" of such duty (if the fuel is at all times retained in customs custody and sold as

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5. 15 Code of Federal Regulations, chap. III, sections 370.26, 371.13, 372.7(c).

6. 15 Code of Federal Regulations, chap. I, section 30.21.

ships' stores directly out of bond) on the ground that the fuel is "exported." (19 U.S.C. 1309.) The other statute, found in Title 26 (Internal Revenue Code), has no relation to customs bonding. (26 U.S.C. 4221.) It is therefore the statute expressing the federal policy which should control the facts of this case. It relieves sales of fuel oil, sold for use as ships' stores, from the federal manufacturers' excise tax, again on the ground that the fuel oil is to be free from tax as an "export." Both statutes express a policy of Congress to protect fuel oil, imported or domestic, from taxation where it is used in the foreign trade of the United States. Hence, the states should not be able to tax domestic oil if they cannot tax imported oil.

Consider next the language of the relevant statutes. Each statute states a flat prohibition against the imposition of a federal tax, the one a customs duty, and the other a manufacturers' excise tax. No language appears in either statute to justify a distinction which would immunize imported oil from a state tax but permit such a tax on domestic oil.

Moreover, the legislative history of the statutes suggests clearly that their purpose was to protect from *taxation* fuel oil sold to vessels engaged in foreign trade. In the *Gulf Oil* case (309 U.S. at 427) the Court referred to the following statements from the legislative debates:

> "At the present time, ships under the American flag or foreign flags, engaged in the various services mentioned here, all have opportunity to buy this fuel or oil at foreign ports, and since we have put a tax on that oil they have been doing it. At the present time we are not getting any revenue out of our vessels engaged in these services. We will not get any revenue out of them if this section passes, but Americans would get the business of selling to them, which is at present prevented by the imposition of the tax." (Congressional Record, 73rd Cong., 1st Sess., p. 3214.)

Relying on this and other expressions of congressional intent, the Court concluded:

> "The obvious tendency of the exemption . . . [as regards imported fuel when] used as ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which has been lost by the imposition of the tax. *That tendency and the tendency of the sale of tax-free fuel to vessels engaged in foreign commerce to promote the commerce* were considerations to be taken into account by Congress in fixing the terms of the statute, and its adoption as a means of regulating and promoting foreign commerce was within the congressional power . . . That such was the purpose of the present legislation is confirmed by its history. [Citing authorities.]" (309 U.S. at 427.) (Emphasis added.)

See also Senate Report No. 58, 73d Cong., 1st Sess., p. 3, discussing similar purposes for section 630 of the Revenue Act of 1932, now 26 U.S.C. 4221.

The lower court erred in failing to recognize the comprehensive scope of the federal policy. It failed to recognize that Congress has acted to exempt both *imported and domestic* oil from taxation. The *Gulf Oil* decision correctly interpreted the federal policy in construing the statute pertaining to *imported* fuel oil (19 U.S.C. 1309); this Court should be guided by the same policy in now interpreting the applicable federal statute pertaining to *domestic* fuel oil. (26 U.S.C. 4221.) Both statutes were passed with a view to accomplishing the same ends—namely, to promote foreign commerce by relieving American manufacturers from a competitive disadvantage in sales of fuel oil to be used as ships' stores.

Otherwise, if the federal policy is limited to promote foreign trade only for oil imported in bond, then imported oil would enjoy a tax immunity that oil of domestic origin did not have. Domestic oil would suffer a tax discrimination and would be unable to compete effectively with imported oil. Congress has spoken with equal clarity of purpose with respect to both types of oil; it clearly did not intend to be heard with respect to only one.

CONCLUSION

It is submitted that the decision of the California Supreme Court fails to recognize that the California sales tax, as applied to the sales of fuel oil involved herein, is invalid and unconstitutional, on the grounds that it violates the *express* prohibition against state taxation contained in the Import-Export Clause, and the *implied* prohibition against state taxation contained in the Commerce Clause and in specific congressional enactments. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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(Appendices Follow)

Appendix A

December 31, 1963

Filed Jan 7—1964 C. C. LaRue, Clerk
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Re: Shell Oil Company vs. State Board of Equalization of the State of California, and The State of California, No. 95,851

Gentlemen:

This case presents a rare opportunity for a trial court to deliver itself of an earth shaking opinion, but since this trial court lacks both time and a staff of research assistants it will set forth its views in letter form with only such detail as may be required for the preparation of findings.

At the outset I wish to compliment counsel on both sides for their exhaustive treatment of the issues in the briefs and on oral argument and to thank them for having presented the court with a transcript of the oral arguments.

After reviewing the stipulated facts and the briefs and arguments and having considered and read most of the cited authorities, I am persuaded that the tax in question

is valid and constitutional with respect to each of the four grounds upon which it has been assailed by the plaintiff.

(1) The tax is not a tax on an export.

In Swan & Finch vs. United States, 190 U.S. 143, the Court was interpreting a statute but stated that "export" under the statute meant the same thing that it meant in the constitutional provision. It concluded that intended arrival at a foreign destination was a necessary element and that oil consumed by a ship during the voyage could not be classified as an export.

In Richfield vs. State Board of Equalization, 329 U.S. 69, the oil sold and taxed was not bunker fuel but cargo. The Court held that delivery to the purchaser in San Francisco was as certain to result in the cargo's arrival at a foreign destination as delivery to a common carrier under an export bill of lading. Though Swan & Finch is not discussed, it seems to me that the Court found that the Swan & Finch condition of intended arrival at a foreign destination was satisfied in the Richfield situation. The same thing can be said of Matson vs. State Board of Equalization, 136 Cal App 2d 577, where the sales tax was applied to the sale of the ship itself. Under the circumstances of that sale the Court concluded that the Swan and Finch condition was satisfied because it expressly cited Swan and Finch for the proposition that intended arrival at the foreign destination is a necessary element of an export. A petition for hearing was denied by the California Supreme Court in the Matson Case. Since the very question before the District Court of Appeal was whether the foreign destination intention was satisfied in the Matson case and no cases saying that the requirement itself is unnecessary have been presented, it seems to me that this Court is bound to find in accord with the District Court's reference to the rule of Swan & Finch.

Since the bunker fuel was not sold with the intention that it reach a destination abroad, it was not an export.

(2) The tax is not invalid as the equivalent of a tax on the goods or as a tax on the export process.

When this phase of the case is discussed, it must be remembered that the "goods" and the process of exportation with which we are concerned involves the overseas shipment of cargo and not bunker fuel.

It is interesting to note that the Richfield opinion and the opinion of the Supreme Court of the United States in Canton R. Co. vs. Rogan, 340 U.S. 511, were both written by Mr. Justice Douglas. He points out the distinction between a tax on the goods themselves or its equivalent and a tax on "handling" them at the port and says at page 514 et seq:

> "An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide."

Plaintiff insists that Mr. Justice Douglas is drawing a line at the waters edge with reference to "handling" cargo, but it seems to me that he is saying that some activities beyond the waters edge may be taxed without being invalid as a tax on the exportation process, depending upon who is engaged in the activity and who is being taxed. In the Canton case the gross receipts by which the tax was measured included rental of a crane owned by the taxpayer and which was used to transport cargo from the wharf of taxpayer to the ship which was to carry the cargo to its foreign destination. Mr. Justice Douglas stated at page 515:

> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence we need not decide whether loading

for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. Joseph vs. Carter & Weeks Stevedoring Co., 330 U.S. 422."

I am unable to conclude that the general sales tax of the State of California taxing the retailer on sales of bunker fuel made to ships engaged in foreign commerce is any more of a tax on the export process than the tax based in part, at least, upon gross receipts from rental of a crane which slings a load of cargo from dock to boat or vice versa.

(3) The tax in question is not invalid under the Commerce Clause.

It seems to me that the airlines cases relied upon by the Attorney General and the case of McGoldrick vs. Campagnie Generale, 309 U.S. 430, are controlling upon this feature of the case.

(4) Congress has not occupied the field with respect to sales of bunker fuels not involving imported components.

The Gulf Oil case, 309 U.S. 414, seems to me to indicate that the Federal Government has occupied the field with reference to imported and bonded oil which is processed and sold as ships stores, but not as to other types of bunker fuel such as that with which we are concerned.

In view of the foregoing it will be in order for Counsel for the Defendant Board to prepare findings and conclusions and form of judgment. I suppose the findings could incorporate the stipulated facts. I will be glad to discuss this feature if counsel so desires.

Yours very truly,

.....

Judge of the Superior Court

SWR:or

Filed Jan 29 1964 C. C. LaRue, Clerk
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Superior Court of the State of California
for the County of Sacramento

No. 95851

Shell Oil Company, a Corporation,
Plaintiff,

v.

State Board of Equalization of the State of California, and the State of California,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, the Honorable Stanley W. Reckers, Judge, Presiding; Graham, James & Rolph by Robert D. MacKenzie, and Raymond A. Greene, Jr., appearing for plaintiff, and Stanley Mosk, Attorney General of the State of California, by Ernest P. Goodman, and John J. Klee, Jr., Deputies Attorney General, appearing for

defendant; the cause having been submitted on written briefs, the Court, having considered the evidence and being fully advised in the premises and having rendered its decision in favor of defendant and against the plaintiff, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

The Court finds that the facts are as stated in the document on file herein titled, "Stipulation of Facts" and said Stipulation of Facts is hereby adopted as findings of fact of this Court.

II

The Court further finds that each and every allegation of the complaint which is not included in the Stipulation of Facts or admitted by the answer is untrue.

III

As additional Findings of Fact, drawn as inferences by the Court from the Stipulation of Facts, the Court finds as follows:

(a) The sales in question were local sales and were not in interstate or foreign commerce and the imposition of the tax in question does not impose a direct burden on interstate or foreign commerce.

(b) The bunker fuel here involved was not an export nor sold for exportation and the tax imposed on the retailer of said bunker fuel was neither a tax on an export nor a tax on the process of exportation.

CONCLUSIONS OF LAW

From the foregoing facts, the Court concludes:

I

The tax here involved does not violate Article I, Section 8, Clause 3 of the United States Constitution (Commerce Clause).

II

The tax here involved does not violate Article I, Section 10, Clause 2 of the United States Constitution (Import-Export Clause).

III

Congressional enactments do not expressly or impliedly prohibit taxation by the states of retailers of domestically produced bunker fuel and, therefore, the tax here involved does not violate Article VI, Clause 2 of the United States Constitution. (The Supremacy Clause).

IV

The application of the tax here involved was correct and valid in all particulars and in accord with the provisions of the Revenue and Taxation Code and was not violative of any provisions of the federal constitution or state constitution or any federal or state statutory provisions, and plaintiff is not entitled to a refund of any portion of the amount here in controversy.

V

Plaintiff shall take nothing by this action and defendant shall have its costs of suit incurred herein.

Judgment is to be entered accordingly.

Dated: January 28, 1964

/s/ STANLEY W. RECKERS
Judge of the Superior Court

In the District Court of Appeal of the State of California in and for the Third Appellate District

[Sacramento]

3 Civ. 10953

Shell Oil Company, a Corporation,
Plaintiff and Appellant,
v.
State Board of Equalization of the State of California, and the State of California,
Defendants and Respondents.

Filed: Sep 28 1965

In this tax refund suit Shell Oil Company challenges California's power to impose its retail sales tax on sales of "bunker" fuel oil for consumption on ships engaged in foreign and interstate commerce. As to sales made to ships of foreign registry and those engaged exclusively in foreign commerce, the tax is claimed to violate the "import-export clause" of the Federal Constitution.[1] Secondly, regardless of vessel registry, immunity from state taxation is urged under the interstate and foreign commerce clause of the Constitution.[2]

1. Article I, section 10, clause 2 of the Federal Constitution declares:
"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. . . ."

2. Article I, section 8, clause 3 of the Federal Constitution declares congressional power "To regulate commerce with foreign nations, and among the several States. . . ."

The case was submitted to the trial court on a stipulated set of facts. The trial court upheld the tax and Shell appeals. According to the stipulation, Shell sells "unbonded" bunker fuel oil as ships' stores to be consumed by the vessels in the course of the voyage. The vessels fall into three categories: (1) vessels registered in foreign countries and engaged in foreign commerce; (2) vessels registered in the United States and engaged in foreign commerce; (3) vessels registered in the United States and engaged in interstate commerce. Each sale was made under a master contract obligating Shell or one of its related companies to furnish fuel to the vessel in any part of the world. Delivery of the oil in question was made at various California ports. In some instances the vessels tied up and received fuel at a fuel dock operated by Shell, in others from a barge operated by Shell or its agent. Each vessel took on cargo at the California port at which it loaded bunker fuel. This cargo was then discharged at foreign or American ports outside California. The stipulation recites that the oil was indispensable to the voyage which followed its purchase and was actually consumed during the voyage. After delivery of the oil Shell submitted a bill to the operator of the vessel. In all cases except one the bill was submitted to a firm located outside California. In two cases the bill was submitted to firms located in foreign countries. In all cases Shell collected the California sales tax and has agreed to refund the tax to the buyers if successful in the present refund action.

Decisions marking the limits of state taxation under the import-export clause usually involve articles unquestionably destined for ultimate use or consumption in a foreign land. The question in such cases is not the article's ultimate character as an export, but whether the process of exportation is under way at the time of the tax incident. The import-

export clause prevents California from imposing a sales tax on articles sold within the state if at the time of sale the certainty of a foreign destination is plain. (Richfield Oil Corp. v. State Board of Equal., 329 U.S. 69, 82-83 (1946); Gough Industries v. State Board of Equal., 51 Cal.2d 746, 749 (1959); Union Oil Co. v. City of Los Angeles, 227 Cal. App.2d 608, 613-614 (1964); Matson Nav. Co. v. State Board of Equal., 136 Cal.App.2d 577, 583-584 (1955); see Empresa Siderurgica v. County of Merced, 337 U.S. 154, 157 (1949); A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69-70 (1923).)

The initial problem here is not whether the process of exportation has been commenced or completed, but whether the article is an "export" at all. The present commodity falls within the general class of ships' stores, destined for consumption in transit without ever reaching a foreign port. The federal Supreme Court has left open the question whether local sales taxes may apply to the sale of oil as ships' stores of vessels in foreign commerce. (McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 429 (1940).)

The constitutional words "import" and "export" are correlative and the definition of one closely affects the meaning of the other. Commencing with Brown v. State of Maryland, 25 U.S. (12 Wheat.) 419 (1827), a number of decisions define an import as an article brought into a port of the United States from a foreign country. (Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869); Arnold v. United States, 13 U.S. (9 Cranch) 104 (1815); Harrison v. Vose, 50 U.S. (9 How.) 372, 381 (1850); Mata v. United States, 19 Fed.2d 484, 486 (1927); American Sugar Refining Co. v. Bidwell, 124 Fed. 683, 686 (1903); Kidd v. Flagler, 54 Fed. 367 (1893); see, Powell, Note, 58 Harv.L.R. 858, 869.) If, as seems evident, the notion of an import implies a domestic port as a neces-

sary element, then the concept of an export connotes the commodity's ultimate destination in a foreign country for use or consumption. (See Dooley v. United States, 183 U.S. 154 (1901).) Neither, then, would cover goods consumed in the course of the voyage. The decisions most in point state that goods placed on a foreign-bound vessel to be consumed on board during the voyage are not exports. (Swan & Finch Co. v. United States, 190 U.S. 143, 144-145 (1903); West India Oil Co. v. Sancho, 108 F.2d 144, 147 (1939), aff'd on other grounds in West India Oil Co. v. Domenech, 311 U.S. 20 (1940); Kidd v. Flagler, supra, 54 Fed. at p. 369 (1893); Matson Navigation Co. v. State Board of Equal., supra 136 Cal.App.2d at p. 583; Schenley Distributors, Inc. v. State Tax Comm'r., 12 Atl.2d 638 (N.J. 1940).)

In Swan & Finch Co. v. United States, supra, a federal statute allowed a drawback or refund of previously paid import duties "on the exportation" of the commodity. The court held that the sale of ships' stores to vessels bound for foreign ports was not an exportation, stating: "Whatever primary meaning be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country." (190 U.S. at pp. 145-146.)

We conclude, then, that the vessel's fuel supply is not itself an "export" within the meaning of the constitutional provision. A more difficult question is whether the tax on the sale of fuel to propel the vessel and its cargo is the equivalent of an impost on the cargo. The import-export clause involves more than an exemption from taxes or imposts upon the goods. (Canton R. Co. v. Rogan, 340 U.S. 511, 514 (1951).) The immunity "runs to the *process of exportation* and the transactions and documents embraced in it." (Empresa Siderurgica v. Merced, supra, 337 U.S. at

p. 156.) Various indirect exactions may be the equivalent of a direct tax on the export commodity. A stamp tax on foreign bills of lading was nullified as the equivalent of a tax on the merchandise covered by the bills. (Fairbank v. United States, 181 U.S. 283 (1901).) A stamp tax on charter parties in foreign commerce has been invalidated, being "in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." (United States v. Hvoslef, 237 U.S. 1, 17 (1915).) A stamp tax on insurance policies covering exports was rejected, being "as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves." (Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 27 (1915).)

On the other hand, an indirect exaction was sustained in Canton R. Co. v. Rogan, supra. There the taxpayer, a railroad, contested a state gross receipts tax measured in part by revenue from handling export goods and rental of dock-side loading facilities. Denying exemption, the court stated: "But the present tax is not on the articles of import and export; nor is it the equivalent of a direct tax on the articles . . . . The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.

"To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge." (340 U.S. at pp. 513-515.)

The Canton Railroad decision left open the question whether a tax on stevedoring services might offend the import-export clause. (340 U.S. at p. 515.) Under the related interstate commerce clause, a local tax on the gross receipts

of stevedoring services has been prohibited as a tax on the privilege of engaging in interstate commerce, but a tax on the business of supplying stevedores sanctioned as an imposition on a local business. (Puget Sound Stevedoring Co. v. Tax Com., 302 U.S. 90 (1937); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).)[3]

These decisions provide no beacon signaling taxability or immunity here. The problem is one of locating a radius of immunity within the larger circle of auxiliary activities culminating in export. The Hvoslef and Thames insurance cases, decided in 1915, emphasized the economic impact of the tax on the exportation process. The Canton Railroad case, decided 36 years later, demonstrates that a tax on export-connected activities is not void simply because it increases the cost of transportation, stressing instead the spatial relationship of the taxed activity to the physical flow of commodities. Applied as the only or the chief touchstone of immunity, each of these tests leaves something to be desired. Economic burden is not particularly trustworthy as a primary test, since a host of domestic exactions increases the cost of exportation as goods move from raw to manufactured state and from point of origin to commencement of the export voyage.[4] Spatial relationship between the journey and the tax incident is a mechanistic test which

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3. We mention without necessarily following City of Philadelphia Tax Review Bd. v. Norton, Lilly & Co., 189 Pa. Super. 91, 149 A.2d 672 (1959), which invalidated a gross receipts tax on a general steamship agent for steamships operating solely in foreign commerce, holding it offensive both to the commerce and the import-export clauses. See Comment, 73 Harv.L.Rev. 586 (1960).

4. See, for example, Empresa Siderurgica v. County of Merced, supra, 337 U.S. 154; Joy Oil Co. v. State Tax Com., 337 U.S. 286 (1949). The economic test was strongly criticized by Mr. Justice Black in his dissenting opinion in Richfield Oil Corp. v. State Board of Equal., 329 U.S. at pp. 87-89.

shunts constitutional objectives to one side. The physical distance from dockside to "water's edge" supplies little elbow room for a difference in constitutional treatment.

A third measurement, utilized in the Richfield Oil case, is the economic effect intended by the framers of the import-export clause. Article I, section 10, clause 2, was adopted at the Constitutional Convention at the insistence of the inland states; its objective, to prevent the seaboard states from levying exactions on national commerce with foreign nations as it flowed through those states. (See Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 76-77; Farrand, *The Records of the Federal Convention of 1787* (1911), vol. II, p. 442; vol. III, p. 328; Note, Taxation Under the Import-Export Clause, 47 Colum.L.Rev. 490, 491 (1947).) In the related provision establishing congressional control of interstate and foreign commerce (art. I, sec. 8, cl. 3), room has been found for nondiscriminatory state taxation so that commerce may "pay its way." The import-export clause, in contrast, prohibits any tax, even a nondiscriminatory general levy applicable to all goods. The area of tax immunity established by the import-export clause is wider and more impervious than that of the interstate commerce clause. The two provisions are not "coterminous." (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at p. 75.)

By all three tests the present tax, applied to sales of fuel oil to foreign-bound ships, invades the core of immunity created by the import-export clause. Either as a result of business economics or state law, the retailer adds the amount of the sales tax to the invoice price of the fuel oil. (See Rev. & Tax. Code, sec. 6053.) In form the exaction is a gross receipts tax on the domestic retailer of oil. In

passing on the federal constitutionality of state taxes, the courts concern themselves "with the practical operation of the tax, that is, substance rather than form." (American Oil Co. v. Neill, 380 U.S. 451, 455, decided April 26, 1965.) In a constitutional sense and by economic result, the tax hits the consumer, in this case the operator of the vessel. (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 84-85; cf. Clary v. Basalt Rock Co., 99 Cal.App. 2d 458, 461-462 (1950); Roth Drug, Inc. v. Johnson, 13 Cal.App.2d 720, 736 (1936).) The occasion for the tax is the operator's purchase of fuel oil, a prime and indispensable necessity of the voyage. The tax does not hit some preliminary and distinct stage of the export process. It hits the ocean voyage itself, the very center and irreducible minimum of the export process. The vessel starts burning fuel oil "at water's edge" and does so all the way across the sea. The operator cannot move the vessel and its cargo to a foreign port without paying the cost of the levy which the state imposes upon the supplier. The cost is a cost of the ocean voyage, directly proportioned to the quantity of fuel and thus to the length of the voyage. The state imposes a greater economic burden on a voyage to Bombay than one to Panama. The state's hand reaches across the sea, the more sea the farther the reach. The economic burden of the state's exaction falls on the cargo, each item bearing a share proportioned in part to the distance of its transportation. The tax is nothing other than a levy on the ocean transportation of export cargo. By burdening a necessity of the voyage, the state erects an economic barrier to the movement of export cargo through California ports enroute to its foreign destination. This is precisely

the kind of economic barrier the import-export clause was designed to prevent.[5]

A related clause of the federal Constitution prohibits the states from imposing a duty of tonnage.[6] A duty of tonnage has been described as a charge for "entering or leaving a port." (United States v. Hvoslef, supra, 237 U.S. at p. 17.) The present exaction on the vessel operator is proportioned to the length of the voyage rather than the tonnage of the vessel; in terms of its interference with foreign commerce, it cannot be distinguished. (See Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d 11, 34-35 (1961).)

It is possible, by a process of transposition, to cull from the interstate commerce decisions language to obscure the nature and impact of the present exaction. The state does not select export cargo as the target of economic burden, but levies a general, nondiscriminatory tax on all retailers, including the seller of oil, to support the services and protections which the state furnishes both seller and purchaser; the tax is not an impost on the voyage, but an excise levied on the retail business of the seller, a domestic business which bears only an incidental relationship to the export process; contemporary, enlightened judicial policy disfavors the creation of islands of immunity shielded from uniform and reasonable state taxation—such is the general

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5. Worthy of note at this point is Mr. Justice Jackson's statement in a separate opinion in Canton R. Co. v. Rogan, supra: "If the constitutional policy [of equal access to the high seas] can be avoided by shifting the tax from the exported article itself to some incident such as carriage, unavoidable in the process of exportation, then the policy is a practical nullity. I think prohibition of a tax on exports and imports goes beyond exempting specific articles from direct ad valorem duties—it prohibits taxing exports and imports as a process." (340 U.S. at p. 517.)

6. Article I, section 10, clause 3, provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage,. . . ."

doctrine sounded in the interstate commerce decisions. (See Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450 (1959); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); additional cases cited, Martin Ship Service Co. v. City of Los Angeles, 34 Cal.2d 793, 795-801 (1950).) The difference in character between the interstate commerce and the import-export clauses blocks any such transposition of doctrine. No implied qualification permitting general, nondiscriminatory levies can be read into the latter. (Richfield Oil Corp. v. State Board of Equal., supra, 329 U.S. at pp. 76-78.) The hard, obtrusive fact is that the dollar-and-cents burden of the present tax falls on the actual process of exportation, the ocean voyage to a foreign port.

We conclude that California cannot constitutionally apply its sales tax to fuel oil sold as ships' stores to vessels engaged exclusively in foreign commerce. The taxpayer is entitled to a refund of taxes to that extent. It is thus unnecessary to consider registry of the vessel as an independent determinant of taxability.

We turn to the sales involving vessels engaged in interstate commerce. The interstate commerce clause does not prevent the states from imposing nondiscriminatory taxes on activities essential to interstate commerce so long as the tax does not unduly burden that commerce. (See cases cited, Martin Ship Service Co. v. City of Los Angeles, supra, 34 Cal.2d at pp. 795-801.) The states may constitutionally impose a sales tax on gasoline and oil fuels used in interstate transport. (Eastern Air Transport, Inc. v. South Carolina Tax Com., 285 U.S. 147 (1932); Standard Oil Co. v. Johnson, 56 Cal.App.2d 411 (1942).) In holding that the interstate commerce clause did not bar a local gross receipts tax on a firm which loaded ships' stores, the Cali-

fornia Supreme Court made a statement which is no less applicable to sales taxation of ships' stores: "There is a clear distinction between the loading and transportation of commodities for shipment in interstate commerce and the loading of food and supplies to be consumed in the course of the journey. The loading of ships' stores, of food, fuel, and supplies, is comparable to the business of a ships' chandler (Puget Sound Stevedoring Co. v. Tax Com., 302 U.S. 90, 94 [58 S.Ct. 72, 82 L.Ed. 68]), or the sale and delivery of gasoline to be consumed in flight by an interstate air carrier. (Eastern Air Transport v. South Carolina Tax Comm., 285 U.S. 147, 153 [52 S.Ct. 340, 76 L.Ed. 673].) Whatever immunity might attach to the interstate carriage of cargo does not extend to the delivery of food and fuel for consumption on the carrier. (Eastern Air Transport v. South Carolina Tax Comm., supra.)" (Martin Ship Service Co. v. City of Los Angeles, supra, 34 Cal.2d at p. 802.)

Another horn to the interstate commerce argument is the assertion that the California tax unconstitutionally exposes interstate commerce to the burdens of multiple taxation. The taxpayer states that the California sales are exposed to taxation in the jurisdictions where the oil purchase contracts were made as well as at the home ports of the respective vessels. These are nothing but conjurations, abstractions evoking spectral possibilities. The taxpayer has not demonstrated the existence of any tax law subjecting the fuel oil to the property, sales or use taxes of another jurisdiction. The courts will not deal with such abstract possibilities. (General Motors Corp. v. Wash., 377 U.S. 436 (1964); American Airlines v. State Board of Equal., 216 Cal.App.2d 180, 193-194 (1963).)

Finally, the taxpayer contends that the federal Congress has "occupied the field" of taxation of fuel oil sold as

ships' stores, impliedly prohibiting state taxation. The taxpayer relies upon section 3451 of the Internal Revenue Code[7] and a related provision of the Tariff Act of 1930 (now appearing in 19 U.S.C., § 1309) permitting free withdrawal of imported commodities held in bond when sold as supplies to foreign vessels. In McGoldrick v. Gulf Oil Corp., supra, 309 U.S. 414, the Supreme Court invalidated a municipal sales tax on the sale of bunker oil manufactured in a bonded warehouse from imported crude oil and sold as ships' fuel in foreign commerce. The court pointed out that although the federal statutes were specifically designed to achieve an exemption from federal import taxation, the purpose of the exemption was to encourage importation of crude oil by assisting American refiners to meet foreign competition in the sale of oil as ships' stores. The court concluded that the municipal tax interfered with that policy objective, thus failing as an infringement of congressional regulation of commerce.

The statutes confronting the court in McGoldrick and the decision itself involved sales to foreign vessels of fuel oil refined from crude oil imported under bond. These statutes, their policy objective and the decision itself have no direct bearing on the problem of taxability remaining

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7. The present version of section 3451 is 26 U.S.C., section 4221. At the time of the sales here in question (1950) this provision was codified as 26 U.S.C., section 3451, and read as follows:

"Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430. . . ."

in this case, that is, sales of unbonded, domestically produced fuel oil sold to ships engaged in interstate, not foreign, commerce. At this point the taxpayer resorts by analogy to the tax restrictions on sales of ships' stores found in former section 3451 of the Internal Revenue Code (quoted in footnote 7, supra), arguing that a state sales tax on the transactions embraced by that section similarly interferes with congressional policy objectives.

Former section 3451 extended to ships' stores, including fuel, an exemption from taxation "under this chapter," that is, from taxes imposed by chapter 29 of the former Internal Revenue Code entitled "Manufacturers' Excise and Import Taxes."[8] The Attorney General points out that chapter 29 imposed no tax whatever on domestically produced crude oil or on fuel oil refined from it. Counsel for the taxpayer does not gainsay that fact. It follows that sales of domestic oil as ships' stores were completely outside the specific terms of former section 3451. To imply from this limited exemption a sweeping prohibition of state sales taxation on domestically produced ships' stores imputes to Congress an intent which would doubtless surprise and confound the framers of the legislation. Excerpts from the Congressional Record evince an intent to assist domestic sellers of ships' stores in meeting competition of suppliers at foreign ports. (77 Cong. Record (73d Cong. First Sess.) p. 3214.) Such a purpose has little connection with vessels engaged in intercoastal and coastwide trade, calling only at American ports. A statute so limited in its language and objectives cannot be stretched to "occupy the field" to the destruction of completely visible and constitutionally permissible forms of state taxation.

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8. That chapter is currently codified as chapter 32 of title 26, United States Code, and is entitled "Manufacturers Excise Taxes." Like its predecessor, 26 United States Code section 4221 confers exemption only from taxes imposed "under this chapter."

That portion of the judgment denying a refund of sales taxes on fuel oil supplied to vessels engaged in interstate commerce is affirmed. That portion of the judgment denying a refund of sales taxes on fuel oil supplied to vessels engaged exclusively in the export trade is reversed and the cause is remanded to the lower court for further proceedings consistent with this opinion.

FRIEDMAN J.

We concur:

PIERCE P.J.

REGAN J.

In the District Court of Appeal of the State of California in and for the Third Appellate District

[Sacramento]

3 Civ. 10953

Filed: Oct. 25 1965

Shell Oil Company, a Corporation,
Plaintiff and Appellant,
v.
State Board of Equalization of the State of California and the State of California,
Defendants and Respondents.

MODIFICATION OF OPINION and DENIAL OF PETITIONS FOR REHEARING

By the Court:

The typewritten opinion in the above-entitled matter filed in this court on September 28, 1965, is modified by substituting the phrase "in carriage of export cargo" for the phrase "in foreign commerce" appearing in the sixth line from the bottom of page 10 thereof.

Both petitions for rehearing are denied.

In the Supreme Court of the State of California
In Bank

SAC. 7576

Filed Jun 6 1966, William I. Sullivan, Clerk

Shell Oil Company,
Plaintiff and Appellant,
v.
State Board of Equalization et al.,
Defendants and Respondents.

The Shell Oil Company seeks a refund of taxes collected from it pursuant to the California Sales and Use Tax Law[1] based upon sales of bunker fuel oil to vessels engaged in interstate and foreign commerce. It contends that the tax is prohibited under the import-export and commerce clauses of the United States Constitution.

The import-export clause provides: "No State shall, without the Consent of Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." (U.S. Const., art. I, § 10, cl. 2.)

The commerce clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States. . . ." (U.S. Const., art. I, § 8, cl. 3.)

In addition to its foregoing contention, Shell also asserts that the tax is improper under section 6352 of the Revenue

1. Rev. & Tax. Code, § 6001 et seq. Section 6051 provides: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers . . . [and applied against] . . . the gross receipts . . . from the sale. . . ." Section 6052 states: "The tax hereby imposed shall be collected from the consumer insofar as it can be done."

and Taxation Code, which exempts from taxation the receipts from sales which the state is prohibited from taxing under the Constitution or laws of the United States or of California. We need not, of course, under the circumstances of this case consider this section independently of our consideration of the import-export and commerce clauses of the federal Constitution.

The vessels, to which the fuel here claimed to have been improperly taxed was sold and delivered, fall into three categories: ships registered in foreign countries and engaged in foreign commerce; ships registered in the United States and engaged in foreign commerce; ships registered in the United States and engaged in interstate commerce. As to all vessels engaged in foreign commerce, Shell contends that bunker fuel oil is itself an "export" within the meaning of the import-export clause and that the tax is thus an improper levy against the "process of exportation."

As to sales to vessels in any of the categories, Shell asserts that the tax exposes commerce to direct and multiple tax burdens prohibited by the commerce clause of the federal Constitution and that, even were this not so, the tax is precluded because Congress has impliedly occupied the field of taxation of bunker fuel oil sold as ships' stores.

The trial court rejected the foregoing contentions and upheld the tax as constitutional as applied to the sales in question. We are persuaded that the trial court has properly resolved the issues presented.

Under the import-export clause, a state may not impose a tax against an article of export if the article has commenced its movement abroad and the "certainty of the foreign destination is plain." (Richfield Oil Corp. v. State Board (1946) 329 U.S. 69, 82-83; Gough Industries v. State Bd. of Equal. (1959) 51 Cal.2d 746, 748-749; see United States v. Hvoslef (1915) 237 U.S. 1, 13.) In the *Richfield*

case oil was shipped to New Zealand with no portion of it being used or consumed in the United States. It was held at page 84 that California's sales tax could not constitutionally be applied, for oil was an export, and its delivery to the hold of the vessel was both "the incident which gave rise to the . . . tax [and] . . . a step in the export process."

The initial issue, therefore, is whether bunker fuel oil, sold for consumption by ships of foreign and domestic registry as they ply the oceans to foreign ports, can be characterized as an article of "export" within the meaning of the import-export clause. While the United States Supreme Court has left open the precise question of whether a "tax upon the sale of . . . oil as ships' stores to vessels engaged in foreign commerce is . . . an impost on . . . exports . . . prohibited by . . . the Constitution" (McGoldrick v. Gulf Oil Corp. (1940) 309 U.S. 414, 429), it and other courts have frequently stated that for an article to constitute an export within the meaning of the Constitution it must be intended for a destination in a foreign country. (See Alaska v. Arctic Maid (1961) 366 U.S. 199, 202; Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 83; Dooley v. United States (1901) 183 U.S. 151, 154-155.) For an article to constitute an import it must actually be brought into this country (Woodruff v. Parham (1868) 75 U.S. (8 Wall.) 123, 131), and it "is the logical sequence of the case of *Woodruff v. Parham,* that the word 'export' should be given a correlative meaning and applied only to goods exported to a foreign country." (Dooley v. United States, *supra,* 183 U.S. 151, 154.) Thus, as it would seem unlikely that articles placed abroad ship for use on that vessel during a voyage to the United States from a foreign land could be deemed imports (cf. Brown v. Maryland (1827) 25 U.S. (12 Wheat.) 419, 442), so it would seem equally unlikely that fuel or other consumables utilized during the voyage from the

United States to foreign shores could be classified as exports.

Shell relies upon infrequent language in some cases to the effect that because goods are intended for shipment out of the country, and not to return, they become exports. It has been stated that to export is merely to "carry or send abroad." (See Canton R. Co. v. Rogan (1951) 340 U.S. 511, 515; Matson Nav. Co. v. State Bd. of Equal. (1955) 136 Cal. App. 2d 577, 583.) A careful examination of these and other cases, however, demonstrates that to constitute an export, an article must not only be "sent abroad" but must be done so with "another country as the intended destination of the goods." (Matson Nav. Co. v. State Bd. of Equal., *supra,* 136 Cal. App. 2d 577, 583; see Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 83.)

In a situation involving a statutory "drawback" "on the exportation" of an article, the United States Supreme Court held that because oil consumed as ships' stores was not an export, the suppliers of the oil were not entitled to a refund of import duties paid upon the importation of the oil (Swan & Finch Co. v. United States (1903) 190 U.S. 143.) The court declared that "whatever primary meaning may be indicated by its derivation, *the word 'export' as used in the Constitution* and laws of the United States, generally means the transportation of goods from this *to a foreign country.* . . . '[E]xportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country' . . . . *It cannot mean simply a carrying out of the country,* for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported,' although in the voyage they are carried out of the country. *Nor would the mere fact that there was no purpose of return justify the use of the word 'export.'* Coal placed on

a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or State as the intended destination of the goods is essential to the idea of exportation." (Swan & Finch Co. v. United States, *supra*, 190 U.S. 143, 144-145, *emphasis added;* cf. McGoldrick v. Gulf Oil Corp., *supra*, 309 U.S. 414, at p. 428.)

Shell next argues that at least with respect to ships of foreign registry, the fuel oil constituted an export at the time of delivery, because such vessels are "foreign territory" and the oil came within "foreign dominion" immediately upon delivery.

The concept that ships of foreign registry are foreign territory is a fiction upon which constitutional issues should not rest, even in part. (See Cunard S.S. Co. v. Mellon (1923) 262 U.S. 100; cf. Foppiano v. Speed (1905) 199 U.S. 501, 519-520.) Though "the statement [is] sometimes made that a merchant ship is a part of the territory of the country whose flag she flies . . . this, as has been aptly observed, is a figure of speech, a metaphor. . . . The jurisdiction which it is intended to describe . . . partakes more of the characteristics of personal than of territorial sovereignty. . . . It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. . . . [The assertion] that a ship is part of the territory of the country whose flag she carries . . . is a fiction. . . ." (Cunard S.S. Co. v. Mellon, *supra*, 262 U.S. at pp. 123-124; cf. Lauritzen v. Larson, (1953) 345 U.S. 571, 585.)

The logic of the *Swan* case applies equally to all vessels, regardless of the technicality of their registration. An article delivered to a vessel which flies a foreign flag cannot, for that reason alone, be deemed to have been received at

a foreign country or destination, and thus to become an "export" within the definitions promulgated by the United States Supreme Court.

While a vessel's fuel supply is thus not itself an export in the constitutional sense, nevertheless if a tax on the sale of the fuel is a tax on the "process of exportation" the tax would be unconstitutional. "[I]mmunity runs to the process of exportation and the transactions and documents embraced in it." (Empresa Siderurgica v. County of Merced (1949) 337 U.S. 154, 156.)

The process of exportation, for purposes of both the import-export clause and the prohibition against congressional levies upon exports from any state (U.S. Const., art. I, § 9, cl. 5), begins when goods are "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." (Coe v. Errol (1886) 116 U.S. 517, 525.) Once an article has entered upon the process of exportation, the process may no longer constitutionally be taxed by any governmental entity. (See, e.g., Empresa Siderurgica v. County of Merced, *supra*, 337 U.S. 154; Richfield Oil Corp. v. State Board, *supra*, 329 U.S. 69.)

In a number of cases, a tax has been held unconstitutional, though not levied upon *articles* of export, because the tax was "the equivalent of a direct tax on the articles." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 513.) In this category fall a federal stamp tax on foreign bills of lading (Fairbank v. United States (1901) 181 U.S. 283), a federal stamp tax on charter parties (United States v. Hvoslef, *supra*, 237 U.S. 1), and a stamp tax on policies of marine insurance covering export articles. (Thames & Mersey Ins. Co. v. United States (1915) 237 U.S. 19). The court in *Thames & Mersey* stated, at pages 25 to 27, that the question was

whether the "tax upon [the insurance policies is] so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation. . . . The answer must be found in the actual course of trade. . . . It cannot be doubted that insurance during the voyage is . . . an integral part of the exportation. . . . The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation . . . is as much a burden on exporting as if it were laid on the . . . goods themselves. Such taxation does not deal with . . . distinct or separable subjects; the tax falls upon the exporting process."

Taken literally, the quoted passage might seem to require, as Shell claims, the invalidating of a tax on any product, process or service somehow related to and necessary for exportation. The acceptance of such a contention would "lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined." (Canton R. Co. v. Rogan, *supra,* 340 U.S. 511, 515.) Such a broad and all-embrasive interpretation of the export clause has never been accepted. (See, e.g.; Canton R. Co. v. Rogan, *supra,* 340 U.S. 511; Empresa Siderurgica v. County of Merced, *supra,* 337 U.S. 154; Joy Oil Co. v. State Tax Commission (1949) 337 U.S. 286; Peck & Co. v. Lowe (1918) 247 U.S. 165; Cornell v. Coyne (1904) 192 U.S. 418; Pittsburgh etc. Coal Co. v. Bates (1895) 156 U.S. 577; Coe v. Errol, *supra,* 116 U.S. 517.) In the *Canton* case a tax measured in large part by the gross receipts of a common carrier of export freight in the port city of Baltimore was upheld against import-export clause challenges. So, too, the court sustained a tax on operations involving freightage of export goods to the port. (Western Maryland R. Co. v. Rogan, (1951) 340 U.S. 520.)

Those cases wherein taxes have been successfully challenged involved taxes so closely related to particular articles

of export that they may be characterized as the "equivalent of a direct tax on the articles." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 513; United States v. Hvoslef, *supra*, 237 U.S. 1; Thames & Mersey Ins. Co. v. United States, *supra*, 237 U.S. 19.) *A sales tax levied against bunker fuel oil sold to a carrier vessel, however, is not related in any manner to the articles of export which the vessel may carry. The tax does not vary with the volume or value of the export articles.* (See Crew Levick Co. v. Pennsylvania (1917) 245 U.S. 292, 297-298.) The amount of tax depends on the amount of fuel purchased; it will vary with the distance to be navigated, and will be imposed without regard to whether the vessel is burdened with export cargo. "[T]he tax is not on the *goods*" shipped as exports (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 514) but on the fuel used to further the transportation of such goods, a "distinct or separable subject" (Thames & Mersey Ins. Co. v. United States, *supra*, 237 U.S. 19, 27), which may be taxed. "An article may be an export and immune from tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide." (Canton R. Co. v. Rogan, *supra*, 340 U.S. 511, 514-515; cf. Martin Ship Service Co. v. City of L.A. (1950) 34 Cal.2d 793.) Nor is the tax on the voyage itself; it is imposed on the *sale* of oil, not on its *use* in foreign commerce. (Cf. Eastern Air Transport Inc. v. South Carolina Tax Comm. (1932) 285 U.S. 147, 152-153.)

The contention that sales of fuel oil may properly be taxed under the import-export clause is re-enforced by a consideration of the cases decided under the commerce clause. The commerce clause and the import-export clause are by no means "coterminous"; while no tax whatever may be imposed directly against exports, the commerce

clause has been interpreted so as to accommodate state powers by upholding taxes "designed to make interstate commerce bear a fair share of the cost of the local government . . . and by invalidating those which discriminate against interstate commerce, which . . . place an undue burden on it. . . , [T]he two clauses, though complimentary, serve different ends. And the limitations of one cannot be read into the other." (Richfield Oil Corp. v. State Board, *supra,* 329 U.S. 69, 75-76.) *Yet when we go beyond the questions of fair burden, or of discrimination, and look to the basic principles, the cases decided under the commerce clause are of obvious relevance in considering issues to be determined under the import-export clause.* It is difficult to understand how the tax imposed on the sale of bunker fuel oil could be considered to infringe on the process of exportation under the import-export clause, and yet be so unrelated to the processes of interstate commerce as not to constitute any burden on such commerce within the meaning of the commerce clause.

The Supreme Court has determined that " 'It is elementary' . . . 'that a State may tax property used to carry on interstate commerce'. . . . [T]he mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State upon intrastate dealers." (Eastern Air Transport Inc. v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 152-153.) In *Eastern Air* the tax was imposed against the sale of fuel to interstate carriers when they were stopped at local airports. Although characterizing the tax as a "license tax," the court concluded at page 152 that even if "such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be so questioned . . . although the property might actually

be used in interstate commerce." The tax in question, the court further held, could not be distinguished from taxes held valid and imposed upon the sale of fuel to railroad carriers in interstate commerce, or upon the vehicles of carriage themselves. (See also, Nathan v. Louisiana (1850) 49 U.S. (8 How.) 73, 80-81; Edelman v. Boeing Air Transport, Inc. (1933) 289 U.S. 249, 252; Martin Ship Service Co. v. City of L.A., *supra*, 34 Cal.2d 793, at p. 799.)

For the foregoing reasons we conclude that the instant tax is "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation. . . ." (Turpin v. Burgess (1886) 117 U.S. 504, 507.) *As a tax levied upon a subject related to but nevertheless distinct and separable from articles of export,* the tax does not violate the import-export clause of the federal Constitution under the facts of the instant case.

The taxpayer next asserts that the sales "involve" interstate commerce, because contracts were executed and payments made outside California, and that all of the sales to vessels are exposed to multiple tax burdens. (See Gwin, Etc., Inc. v. Henneford (1938) 305 U.S. 434.)

Within prohibited areas of state taxation of interstate commerce is a tax on the *use* of fuel as an instrumentality of interstate commerce, in interstate commerce. (Helson and Randolph v. Kentucky (1929) 279 U.S. 245.) But a sales tax imposed generally upon purchases made locally for purposes of consumption is permissible, although the goods had just traveled in interstate commerce. (McGoldrick v. Berwind-White Co., (1940) 309 U.S. 33.) And a tax may be levied upon an intrastate transaction though the article sold or delivered is to be forthwith shipped out of the state. (Dept. of Treasury v. Wood Corp. (1941) 313 U.S. 62, 68.) Directly in point, of course, is the decision of the court upholding the tax on the sale of fuel to airplanes in inter-

state commerce, discussed above with reference to the import-export clause. (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147.) In that case the court pointed out that even were the tax to be considered as levied directly upon the goods sold, "that aspect [of] the tax would be upon a part of the general mass of property within the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce." (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 152.) A state may also "validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of . . . planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. . . . '[so long as the tax] falls short of a tax directly imposed on its use in interstate commerce.' . . ." (Edelman v. Boeing Air Transportation, *supra,* 289 U.S. 249, 252.)

The tax imposed on the sales of fuel in the instant case was not an unconstitutional burden under the commerce clause, for "a non-discriminatory tax upon local sales . . . has never been regarded as imposing a direct burden on interstate commerce" (Eastern Air Transport v. South Carolina Tax Comm., *supra,* 285 U.S. 147, 153; Henneford v. Silas Mason Co. (1937) 330 U.S. 577, 582-583), "notwithstanding that [the] ultimate function [of the fuel] is to generate motive power for carrying on interstate commerce." (Edelman v. Boeing Air Transportation, *supra,* 289 U.S. 249, 252.)

The taxpayer further asserts that because of the fiction of the territoriality of vessels and because of the home port doctrine of Hays v. The Pacific Mail Steamship Co. (1854) 58 U.S. (17 How.) 596, the vessels here involved are subject to taxation by the state or country of their registry,

and that therefore the tax is unconstitutional because the sale might be exposed to multiple burdens. This contention is also without merit.

First, there is no basis, in reality, for the fiction that the ships were foreign territory and that delivery of the fuel oil took place in a state or country outside California. Thus, even though the home port is the situs of the vessels for purposes of the levy of a property tax (see Hays v. The Pacific Mail Steamship Co., *supra,* 58 U.S. 596), there is no ground under which other states could impose a tax on the identical transactions consummated in California, without violating the commerce and due process clauses of the Constitution. (Freeman v. Hewit (1946) 329 U.S. 249; Miller Bros. Co. v. Maryland (1954) 347 U.S. 340; McLeod v. Dilworth Co. (1944) 322 U.S. 327.) For the foregoing reason the Supreme Court was not troubled by any imagined problems of multiple taxation in the *Edelman* and *Eastern Air* cases where taxes nearly identical to the tax imposed by California in the instant case were upheld. As to the vessels registered abroad, Shell has failed to demonstrate that it has ever been the concern of any United States jurisdiction in construing the commerce clause that a foreign country might arbitrarily impose a tax on sales in the United States to one of its citizens, or to ships carrying its flag. In asserting that California may not tax such sales Shell's argument "erroneously attributes to such taxation the risk of discrimination. Actually it is attributable to the freedom of foreign countries, not permitted to our own states, to adopt rules of their own that can result in multiple burdens. The court cannot prevent foreign countries from taxing instrumentalities of foreign commerce owned by their domiciliaries. . . . It is without power to compel independent nations to adopt a uniform nondiscriminatory system of taxation. It does not follow that the states must forego the

power to impose taxes that are not in themselves discriminatory." (Scandinavian Airlines System Inc. v. County of Los Angeles (1961) 56 Cal.2d 11, 44-45, Traynor, J., dissenting.)

Moreover, even were it true that the sale in California could be taxed by the state of the vessel's registry, or that taxes levied by a foreign country were a concern of the courts in determining the validity of a state tax under the commerce clause, appellant has failed to demonstrate that the sale is in fact subject to multiple burdens. The abstract possibility that duplicative taxes might be levied by another jurisdiction against the identical transactions, is not the concern of the courts in determinations made under the commerce clause. "'[T]axpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. . . . And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation,' . . . and we adhere to that position." (General Motors Corp. v. Washington (1964) 377 U.S. 436, 449; see Southern Pac. Co. v. Gallagher (1939) 306 U.S. 167, 172.)

The taxpayer finally contends that Congress, in enacting certain statutes, has "occupied the field" of taxation of fuel oil sold as ships' stores, and thus impliedly precluded state taxation of such commodities.

"There seems little doubt . . . that under its power over interstate commerce, Congress can fix the bounds of state taxation of that commerce." (Hartman, *State Taxation of Corporate Income,* 13 Vand.L.Rev. 21, 122 (1959); see

McGoldrick v. Gulf Oil Corp., *supra*, 309 U.S. 414; cf. Michigan-Wisconsin Pipe Line Co. v. Calvert (1954) 347 U.S. 157, 165-166.) Although there has been little direct discussion of the limits of federal preclusion with respect to the area of *taxation*, the rules are fairly clear in the area of *regulation* of commerce. When there is a direct conflict between state and federal statutes, or if the subject demands uniformity of regulation, the state statute must fall; the question of implied prohibition, however, is another matter. (See Kelly v. Washington (1937) 302 U.S. 1, 9.)

An issue of implied prohibition arises when a federal act impinges on subject matter which a state statute attempts also to regulate, even though there is no direct contradiction between the enactments. "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field . . . is not forbidden or displaced. . . . [T]he exercise by the State of its police power . . . . is superseded only where the repugnance of conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (Kelly v. Washington, *supra*, 302 U.S. 1, 10.) The intent to occupy the field is "'. . . . not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.'" (Huron Cement Co. v. Detroit (1960) 362 U.S. 440, 443.) There is no reason to believe that the rule as to the implied occupation of the field of taxation is any more strict; it would indeed be difficult to contend that if Congress has taxed a particular item it thereby precludes a state levy against the same item.

Appellant relies in part upon section 3451 of the Internal Revenue Code which, at the time of the sales here in ques-

tion, read, as pertinent: "Under regulations prescribed . . . no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores . . . or legitimate equipment on vessels . . . actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States. . . . *Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for purposes of section* 3430. . . ." The chapter referred to in section 3451 (Chapter 29 of the Internal Revenue Code of 1939) was entitled "Manufacturers' Excise and Import Taxes"; section 3422 of that chapter imposed a tax upon the importation of petroleum and upon fuel oil and other products derived from such imported petroleum. Additionally, relevant provisions of the Tariff Act of 1930 provide that withdrawals under certain regulations from customs bonded warehouses or internal revenue bonded warehouses of supplies manufactured from certain imported oil and delivered for use by vessels and aircraft engaged in foreign trade are to be exempt from customs duties and internal revenue tax. (19 U.S.C., § 1309.)

In McGoldrick v. Gulf Oil Corp., *supra,* 309 U.S. 414, the Supreme Court held exempt from a sales tax levied by New York City deliveries of fuel oil refined from crude petroleum imported and confined to warehouses under bond as provided for under the above statutes and the federal regulations made pursuant thereto. The court pointed out at pages 425 and 426 that "From the time of importation until . . . laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and . . . is subject to the supervision and control of federal customs officers." The court

made it clear that the oil remained separate from the mass of property subject to the tax upheld under the commerce clause in McGoldrick v. Berwind-White Co., *supra,* 309 U.S. 33.

The court determined that the statutes and multiple regulations involved in *Gulf Oil* represented a comprehensive regulation of *imported oil.* The enactments, including customs regulations specifically exempting imported goods in bonded warehouses from state taxation and deemed incorporated by reference into the Tariff Act of 1930, ". . . afford a comprehensive scheme for the regulation of the *importation* of the crude petroleum and of its control while in the course of manufacture in bond into fuel oil and its delivery as ships' stores. . . ." The local tax conflicted with congressional policy, for "Congress *provided for the segregation of the imported merchandise*" in furtherance of the purpose of relieving the *"importer of the import tax* so he might meet foreign competition in the sale of fuel as ships' stores." (Pp. 426-428, *emphasis added.*)

The *Gulf Oil* case demonstrates that Congress intended to occupy only a limited field outside of which state regulations are not forbidden or displaced. (See Kelly v. Washington, *supra,* 302 U.S. 1, 9.) It is clear that the *statutes invoked by Shell as construed in Gulf Oil do not purport to limit even the right of the federal government to levy taxes on sales of domestically produced fuel oils from ordinary stocks,* and certainly they are too circumscribed in their language and purpose to be deemed to occupy the field or conflict with the California sales tax imposed against the sales in the instant case.

The taxpayer has thus failed to demonstrate the invalidity of the tax in any respect. Accordingly, the judgment is affirmed.

PEEK, J.

We Concur:
TRAYNOR, C. J.
PETERS, J.
TOBRINER, J.
BURKE, J.
*WHITE, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

CONCURRING AND DISSENTING OPINION

I would reverse that portion of the judgment denying a refund of sales taxes on fuel oil sold as ships' stores to vessels engaged exclusively in the export trade, for the reasons expressed by Mr. Justice Friedman in the opinion prepared by him for the District Court of Appeal in Shell Oil Co. v. State Board of Equalization (Cal.App.) 46 Cal. Rptr. 653.

In all other respects I would affirm the judgment.

McComb, J.

Appendix B

California Revenue and Taxation Code

"Section 6051—Levy on Retailers' Gross Receipts; Rate

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter. (Added Stats. 1941, c. 36, p. 536, § 1, as amended Stats. 1943, c. 357, p. 1581, § 1; effective May 7, 1943; Stats. 1943, c. 1004, p. 2918, § 1, effective June 3, 1943; Stats. 1945, c. 646, p. 1292, § 3, effective June 5, 1945, operative July 1, 1945; Stats. 1947, c. 780, p. 1866, § 3, effective June 17, 1947; Stats. 1948, c. 12, p. 16, § 3, effective April 9, 1948.)"

"Section 6052—Collection by Retailer From Consumer

"The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done. (Added Stats. 1941, c. 36, p. 536, § 1.)"

"Section 6352—Property Exempted by Constitution or Federal Law

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. (Added Stats. 1941, c. 36, p. 540, § 1.)"

19 U.S.C. 1309

"Supplies for Certain Vessels and Aircraft—Exemption from Customs Duties and Internal-Revenue Tax

"(a) Articles of foreign or domestic origin may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe, from any customs bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone free of duty and internal-revenue tax, or from any internal-revenue bonded warehouse, free of internal-revenue tax—

"(1) for supplies (not including equipment) of (A) vessels or aircraft operated by the United States, (B) vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, or between Hawaii and any other part of the United States; or

". . . .

"(b) Articles withdrawn from bonded warehouses, bonded manufacturing warehouses, continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, and articles of domestic manufacture or production, laden as supplies upon any such vessel or aircraft of the United States or laden as supplies (including equipment) upon, or used in the maintenance or repair of, any such foreign vessel or aircraft, shall be considered to be exported within the meaning of the drawback provisions of this chapter . . ." (As amended)."

26 U.S.C. 3451

"Exemption from Tax of Certain Supplies for Vessels

"Under regulations prescribed by the Commissioner, with

the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of Section 3430." (Now 26 U.S.C. 4222, as amended, c. 736, 68A, Stat. 495 (1954)).

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In the Supreme Court of the United States

OCTOBER TERM 1966

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No. 863

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al,
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

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In the Supreme Court of the United States

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al,
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby moves the Court to dismiss this appeal or to affirm the decision of the California Supreme Court for the following reason:

The case does not present a substantial federal question.

SUMMARY OF APPELLEES' POSITION

In this suit, appellant sought a refund of sales tax which it reported and paid to the State of California[1] with respect

1. The California Sales Tax is a privilege tax of general application imposed on all retailers in the State of California, measured by the gross receipts from their sales of tangible personal property. (California Revenue and Taxation Code, section 6051.)

to sales of bunker fuel delivered and placed in the purchasing vessels' fuel tanks in California and used to propel such vessels on the high seas. The California Supreme Court concluded that there was no merit to the variety of constitutional arguments made by appellant and upheld the validity of the tax.

Appellant, without support in reason or authority, is seeking to upset established legal principles and to restrict the taxing powers of the state and federal governments by the creation of constitutional immunities never before recognized by this Court. This is readily apparent from the following statement of appellant's contentions, which is accompanied by a summary of our response thereto.

1. Appellant's first argument is based on Article I, section 10, clause 2 (the Import-Export Clause) of the federal constitution, which prohibits state taxation of imports and exports. Appellant argues that fuel used on the high seas is an "export" within the meaning of that constitutional provision and the sale thereof is thus immune from taxation if the vessel to which the fuel is sold is either foreign owned or domestically owned and headed for a foreign port. That contention was considered and rejected in *Swan and Finch Company v. United States,* 190 U.S. 143, wherein this Court stated that fuel supplies are not exports within the meaning of the United States Constitution. Appellant does not attempt to distinguish the *Swan and Finch* case but argues that this Court's statement in that regard was merely a "gratuitous and uncalled for remark." Also relevant is *Puget Sound Stevedoring Co. v. Tax Comm.,* 302 U.S. 90, 94, wherein this Court referred to the taxability of ship's chandlers.

2. Again basing its contention on the Import-Export Clause, appellant next argues that any tax which effects

an "economic burden" on the movement of goods "beyond the water's edge" in foreign commerce is unconstitutional as a tax on the "process of exportation." That argument is answered by *Canton Railroad Co. v. Rogan,* 340 U.S. 511, wherein this Court analyzed the cases relied on by appellant as holding invalid only those taxes which are equivalent to a direct tax on the exported articles themselves. There is no factual, or even theoretical, basis upon which it can be said that a tax on the seller of fuel to a vessel operator is the equivalent of a direct tax on the export cargo, if any, on the vessel at the time the fuel is loaded.

3. Appellant next suggests that the imposition of the tax here involved is barred by the Commerce Clause. In this regard, appellant argues that the delivery of the fuel occurred outside of California despite the fact that all deliveries were made within the territorial limits of California. Appellant's theory in this regard appears to be that a vessel whose port of registry is not in California is really a little piece of another state or country. Appellant's contention is answered by *Foppiano v. Speed,* 199 U.S. 501, in which this Court expressly considered and rejected that theory. In addition, appellant attempts to raise a "multiple burden" argument. That contention is answered by *General Motors v. Washington,* 377 U.S. 436 in which this Court held that a "multiple burden" argument will not be considered by this Court unless multiple burden in a constitutional sense is actually present in the case before this Court. It has been expressly stipulated in the instant case that no other jurisdiction has attempted to impose a tax on any of the sales of fuel here involved.

4. Finally, appellant argues that when Congress exempted items sold as ship's stores from the federal manu-

facturers' excise and import taxes, it intended to pre-empt the field and to prohibit any state taxes on ship's stores. In making this argument, appellant misconstrues the decision of this Court in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, in which this Court made clear that any implied prohibition of state taxation by the federal government was in the area of protection of imports which had remained under federal bond and had never become part of the mass of goods in the taxing state.

STATEMENT OF THE CASE

Appellant is a Delaware corporation whose principal business is the exploration for and production of crude oil and the refining and marketing of petroleum products. Appellant is engaged in business in California as a retailer of petroleum products and holds a seller's permit as required by the California Revenue and Taxation Code.

As a part of its retail sales business, appellant sold and delivered unbonded bunker fuel to vessels at appellant's facilities here in California. Some of these sales were to vessels of foreign registry or to vessels of domestic registry engaged in foreign or interstate commerce. None of the fuel here in question was delivered to the vessels as cargo. All the fuel here involved was placed on board the vessel as the vessel's fuel supply and was actually used by the vessel as its source of power.

In its sales and use tax return filed with the California State Board of Equalization for the period here involved, appellant included in the measure of its sales tax the gross receipts from its sales of bunker fuel sold to vessels as fuel. The tax, as self-assessed, was timely paid. Within the time allowed by law, appellant filed a claim for refund of the tax paid with respect to those sales of bunker fuel which were to vessels of foreign registry or to vessels of

domestic registry engaged in interstate or foreign commerce. The State Board of Equalization denied the claim and appellant brought this suit for refund.

The trial court rejected all of appellant's contentions. The California District Court of Appeal, an intermediate appellate court of appeal, rejected all of appellant's contentions except the "process of exportation" argument. Appellant did not petition for a hearing in the California Supreme Court respecting the issues decided adversely to it. However, the California Supreme Court granted a hearing at the request of appellees and rejected appellant's arguments on all of the issues here involved.

Appellant's statement of facts is not accurate in a number of particulars. Appellant states that all the contracts to supply the fuel here involved were executed outside California. That is not true. The contract with Ocean Prince, Inc., was executed in California (Clerk's Transcript, p. 17).

Appellant states that each ship took on cargo at the California port at which it took on fuel. That is not true. Three of the eight vessels involved in this litigation, to wit, the *Ocean Prince,* the *S.S.O.M. Bermuth,* and the *S.S. Panagiotis Coumantaros,* did not load cargo when they purchased fuel in California (Clerk's Transcript, pp. 32, 33.)

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

I. Taxation of the Sales of Bunker Fuel to Vessels for Use as Fuel Supplies Does Not Violate Article I, Section 10, Clause 2, of the Federal Constitution (the "Import-Export" Clause).

Article I, Section 10, Clause 2 of the United States Constitution provides that no State shall, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports." That provision, commonly called the "Import-Export" Clause, prohibits any state tax upon an item

which is an "export" once the item has begun the "process of exportation." (*Richfield Oil Corp. v. State Board,* 329 U.S. 69.)

This Court, in *Swan and Finch Company v. United States,* 190 U.S. 143, held that items of ship's stores and fuel supplies sold or delivered to vessels destined for foreign ports to be consumed on the voyage are not "exports" as that term is used in the United States Constitution. The *Swan and Finch* case involved an importer, manufacturer, and exporter of oils. The lubricating oil there involved was manufactured out of imported rape seed oil upon which import duties had been paid. The federal statute then in force allowed the manufacturer a drawback of the import duties upon the "exportation" of the imported goods. The manufacturer sold some oil to vessels bound for foreign ports to be consumed by the vessels as lubricating oil during their voyage. The manufacturer claimed a drawback for the oil so sold. The Treasury Department denied the claim on the basis that oil sold as ship's stores is not an "export." The manufacturer brought an action in the Court of Claims, which also held that the oil was not an "export." The manufacturer took an appeal to this Court, which, after stating the facts announced:

> "The statute allows the drawback 'on the exportation,' and the question is whether goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed, are exported.
>
> "The careful opinion of the Court of Claims, which in general we approved and to which we refer, relieves us from the necessity of an extended discussion. *Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.* 'As

the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Ops.Attys.Gen. 583.

"True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego, as 'exported,' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export.' Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. *Another country or State as the intended destination of the goods is essential to idea of exportation.*" (190 U.S., 144-145) (Emphasis added.)

Both the Court of Claims and this Court declared that in the statute there under consideration the word "export" was used in its Constitutional sense and that items sold to vessels bound for foreign ports as ship's stores and fuel supplies are not exports within the meaning of the Constitution or the statute since they are not destined for a foreign country.

The *Swan and Finch Company* case is not an isolated decision. The principle it established has been followed by other courts. *West India Oil Co. v. Sancho,* 108 F.2d 144 (CCA, 5th) aff'd on other grounds 311 U.S. 20; *National Sugar Refining Company v. United States,* 161 F. Supp. 606 (Ct. Claims, 1958).

In addition, later decisions of this Court have enunciated a definition of "export" consistent with the holding of *Swan and Finch Company*. In *Richfield Oil Corp. v. State Board, supra,* the question to be determined was when did the oil, which was delivered to the vessel as cargo and conceded to be an export, begin the export journey. This Court nevertheless recognized the requirement of an intended foreign destination since it prefaced a portion of its opinion by stating:

> "The requirement that foreign commerce be involved (*Woodruff v. Parham,* 8 Wall. 123, 136) is met for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem." (329 U.S. at page 78).

In *Canton R. Co. v. Rogan,* 340 U.S. 511, this Court stated, at page 515:

> "To export means to carry or send abroad; . . ."

Thus, it has been established by this Court that items sold or delivered to vessels as fuel supplies or ship's stores to be consumed on the voyage are not "exports" within the meaning of the Constitutional prohibition of taxation of "exports." This result is consistent with *Puget Sound Stevedoring Co. v. Tax Comm.,* 302 U.S. 90, 94, in which this Court indicated that a ship's chandler was a local business, distinct from the commerce it serves and subject to taxation free of constitutional limitations.

Appellant's lengthy discourse on the issue is nothing more than an attempt to have this Court ignore the principles already established by this Court. Thus, apparently recognizing that the *Swan and Finch Company* decision is directly contrary to its position in this case, appellant does not attempt to distinguish the case but merely asserts

that the statements in the opinion should be ignored as "gratuitous and uncalled for remarks." We do not believe that the *Swan and Finch Company* decision should be so lightly brushed off.

The *Swan and Finch Company* case is the only case in which this Court was squarely faced with the question of whether items delivered to a vessel as ship's stores were exports. This Court clearly and emphatically stated that the word "export" was used in the statute there under consideration *in its Constitutional sense* and, as used *in the Constitution,* did not include items delivered to vessels as ship's stores. This Court's statement that ship's stores are not exports within the meaning of the Constitution was not mere dictum, as appellant would lead us to believe, but was a necessary part of its decision in view of its conclusion that "export" in the statute had the same meaning as in the Constitution.

There is no reason for overruling or rejecting the analysis of the *Swan and Finch Company* decision. The opinion was based on the rationale that, in its generally understood meaning, the word "exports" refers to items that are shipped from this country destined for a foreign country, not items that, although they are leaving this country, have no foreign destination. That point is as valid today as it was when it was initially pronounced by this Court.

Appellant's other arguments are likewise untenable. For example, appellant asserts that as to vessels of foreign registry, the fuel has a destination in a foreign country even though it will be consumed on the high seas. (Juris. St. page 12) The rationale behind that rather novel assertion is the contention that delivery to a foreign vessel here in California is equivalent to delivery abroad. There is absolutely no support for that proposition. In fact, *Richfield Oil Corp. v. State Board, supra,* is direct authority to

the contrary. In *Richfield,* this Court was faced with the question of whether the oil there involved was in the export process at the time it was delivered here in California to the vessel of foreign registry. This Court held that it was and stated,

> "That delivery marked the *commencement* of the movement of the oil abroad." (Emphasis added.) 329 U.S., 83.

If appellant were correct (i.e., if delivery to a vessel of foreign registry is equivalent to delivery abroad), then this Court would have stated that the delivery *ended* the journey abroad. By stating that the export journey *commenced* in California, this Court certainly indicated that the journey ended in New Zealand, where the oil was finally unloaded from the vessel.

Moreover, it would be a poor policy, indeed, that would lead to the result that fuel oil supplied to a vessel of foreign registry would be an export whereas similar fuel oil supplied to a vessel of domestic registry engaged in identical trade would not be an export. It is hard to imagine that the framers of the Constitution intended such outright discrimination against domestic companies.

The difficulty faced by appellant in finding support for its position is underlined by its attempt to rely on *Gulf Oil Corp. v. McGoldrick,* 282 N.Y. 612. That case actually held that fuel in bond was protected as an "import." This Court in affirming, at 309 U.S. 414, did not rely on the import-export clause. As a matter of fact, at page 428 of its decision, this Court stated, when discussing the drawback statute, that goods may be "exported or otherwise sent out of the country." This statement would appear inconsistent with the argument here advanced by appellant that leaving the country and exportation are synonymous.

II. Taxation of the Gross Receipts of a Retailer Arising from the Sale of Fuel to Vessels Engaged in Foreign Commerce Is Not Barred by the "Import-Export" Clause as a Tax on a "Step in the Process of Exportation."

Appellant asserts that, even if the fuel is not itself an export, the present tax is nevertheless unconstitutional for the reason that the Import-Export Clause prohibits any tax which creates an "economic burden" on the movement of goods "beyond the water's edge." The cases relied on by appellant do not support or even suggest such a standard.

The limits of immunity of the Import-Export Clause are set forth by this Court in *Canton R. Co. v. Rogan,* 340 U.S. 511, this Court's latest pronouncement on the subject. In *Canton R. Co.,* the taxpayer attacked as unconstitutional under the Import-Export Clause a Maryland franchise tax, measured by gross receipts, insofar as the gross income by which the tax was measured included revenues derived from the handling of goods bound for exportation. This Court rejected the taxpayer's contentions and stated, beginning at page 513, that:

> "If this were a tax on the articles of import and export, we would have the kind of problem presented in *Spalding & Bros. v. Edwards,* 262 U.S. 66; *Richfield Oil Corp. v. State Board,* 329 U.S. 69; *Hooven & Allison Co. v. Evatt,* 324 U.S. 652; and *Joy Oil Co. v. State Tax Comm'n,* 337 U.S. 286. But the present tax is not on the articles of import and export; *nor is it the equivalent of a direct tax on the articles,* as was held to be true of stamp taxes on foreign bills of lading (*Fairbank v. United States,* 181 U.S. 283), stamp taxes on charter parties in foreign commerce (*United States v. Hvoslef,* 237 U.S. 1); and stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co. v. United States,* 237 U.S. 19. It is true that the latter cases indicated that the

prohibition of the Import-Export Clause against taxes on imports and exports involves more than an exemption from taxes laid upon the goods themselves. Moreover, *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292, following the reasoning of *Brown v. Maryland,* 12 Wheat. 419, 444-445, gave like immunity to the business of selling goods in foreign commerce when gross receipts were taxed. Cf. *Anglo-Chilean Corp. v. Alabama,* 288 U.S. 218. Though appellant is not engaged in the import-export business, it claims that its handling of goods, which are destined for export or which arrive as imports, is part of the process of exportation and importation. In support of the argument it refers to language in *Spalding & Bros. v. Edwards, supra,* and *Richfield Oil Corp. v. State Board, supra,* relative to when the export process starts; and it argues that, if the baseballs and the baseball bats in *Spalding* and the oil in *Richfield* were immune from the sales taxes because those commodities had been committted to exportation, the same immunity should be allowed here since the goods handled by appellant were similarly committed. The difference is that in the present case the tax is not on the goods but on the handling of them at the port. *An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide."* (Emphasis added.)

Thus, the principle established by this Court is that a tax, although not directly imposed on the export cargo itself, will be in violation of the constitutional prohibition against taxing exports if the tax can logically be found to be the equivalent of a direct tax on the export cargo.

Appellant, to support its argument for an "economic burden" plus "spatial limitation" test, relies chiefly on three early decisions of this Court, to wit, *United States v. Hvos-*

lef, 237 U.S. 1; *Fairbank v. United States*, 181 U.S. 283; and *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19. Those cases, however, do not support the rule which appellant urges upon this Court. To the contrary, a careful reading of those cases shows that, as stated in *Canton R. Co. v. Rogan, supra*, this Court has held invalid as a tax on the "process of exportation" only those taxes which have been found to be the *equivalent of a direct tax on exported articles themselves*. This Court carefully pointed out that the documents on which the stamp tax was imposed, such as the bill of lading (*Fairbanks*) and the marine insurance policy (*Thames & Mersey*), were needed by the exporter to meet commercial requirements for the sale of the cargo, while the type of charter party involved in the *Hvoslef* case was considered by this Court to be the equivalent of a contract for the carriage of goods. It is significant that in each of these cases the stamp tax was being imposed on a contractual or property right acquired by the *exporter himself* and involved an essential step in conducting his exporting activities.

As declared by this Court in the quotation from the *Canton R. Co.* case set forth above, the taxes involved in those cases were found to be "equivalent to a direct tax on the articles" of cargo. Appellant has not cited, and we have not discovered, any case (from this Court or any other tribunal) which has held a tax invalid merely on the basis that it increases the cost of moving goods on the high seas, i.e., "beyond the water's edge."

The taxes involved in the cases relied on by appellant are not in the least analogous to the tax here under consideration. Certainly the sales tax imposed upon the retailer of fuel to the vessel is not the "equivalent of a direct tax on the articles" which constitute the vessel's cargo. It

seems apparent that the amount of fuel purchased by a vessel in any particular port bears no relation whatsoever to the amount of or value of cargo, if indeed there even is any cargo, on the vessel at the time of purchase. At the most, the present tax affects exportation only indirectly and remotely, and as such, is constitutional (*Peck & Co. v. Lowe*, 247 U.S. 165).

An examination of some of the various state and federal taxes that are clearly allowable reveals there is no mechanistic rule against any tax which increases the cost of moving goods beyond the water's edge. For example, it is a fundamental rule of taxation that the "home port" or port of registry of ocean-going vessels engaged in interstate and foreign commerce can impose an *ad valorem* property tax on the vessel (*Hays v. Pacific Mail SS Co.*, 17 How. 596; see discussion of "home port" doctrine in *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 19-22). Surely an *ad valorem* tax on the vessel itself more directly increases the shipowner's cost of doing business than does a tax imposed upon retailers of fuel oil. Yet appellant must concede that such a property tax does not violate the Import-Export Clause.

The federal government, although subject to the same restrictions respecting the taxation of exports as are the states, has, since the beginning of our country, imposed tonnage duties and "light money" duties on certain vessels entering United States ports from foreign ports (46 U.S.C. §§ 12, et seq.; see general discussion and cases cited in 48 Am. Jur., Shipping § 65D). This clearly constitutional charge on operators of vessels engaged in foreign commerce certainly increases the cost of moving goods in commerce.

The federal government also imposes taxes on employees and employers based on the gross wages paid

the employee by the employer. (On employee—I.R.C. § 3101; on employer—I.R.C. § 3111.) These taxes apply to seamen employed on domestic vessels if the contract of employment was entered into in the United States (I.R.C. § 3121(b)). The tax on the ship operator measured by the gross wages paid its employees even more directly operates to increase the ship operator's cost of doing business than does a tax on the retailer of fuel. Yet these federal taxes, collected to offset the cost of the various federal "social security" programs, clearly are not taxes on the "process of exportation."

These examples demonstrate that, contrary to appellant's contention, not every tax which relates to matters "beyond the water's edge" is unconstitutional. The tax in question must still, in order to be held in violation of the Import-Export Clause, be the equivalent of a direct tax on the articles of export themselves. Since the present tax is not a tax which can be said to be the equivalent of a direct tax on the exported articles themselves, it is clearly outside the scope of the tax immunity granted by the Import-Export Clause of the federal Constitution.

To support its "process of exportation" argument, appellant makes the bold assertion that the California tax on sellers of fuel oil is passed on pro-rata to the customers of the vessels which purchase the fuel. Appellant has neither produced any evidence nor cited any authority whatsoever to support that contention. Indeed, there is no authority or evidence to support the contention for appellant's assertion in that regard is mere speculation. In appellees' Petition for Hearing before the Supreme Court of the State of California, there is discussed at great length the many economic factors that go into the setting of shipping rates, such as the elasticity of supply

and demand respecting both goods to be shipped and the ships themselves, together with the cartel type rate setting agreements which pervade the shipping industry. It is just this type of speculation on tax burden which this Court has wisely avoided when ruling on the constitutionality of taxes. See *Graves, et al v. New York, ex rel O'Keefe,* 306 U.S. 466, 484; *Helvering v. Gerhardt,* 304 U.S. 405, 412-415; *Werner Co. v. Director of Taxation,* 350 U.S. 492, 494; *Society for Savings v. Bowers,* 349 U.S. 143.

Moreover, in the present case there certainly is no evidence to support the assertion that the present tax was borne by the vessel's customers. Although appellant has stipulated that any recovery it receives in this case will be returned to the vessel operators, there is a conspicuous lack of any statement that the vessel operators will in turn make refunds to their customers.

It is respectfully submitted, therefore, that there is no merit to the contention that the present tax is a tax on the "process of exportation." By no stretch of the imagination can a tax on the sale of fuel to a vessel be said to be the equivalent of a tax on the vessel's export cargo—especially in a case such as this where three of the eight vessels did not even have any export cargo on board when they left California ports.

III. The Tax Here Involved Does Not Violate Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause).

It is clearly established that a sales tax imposed upon those sales of a local retailer that are made to purchasers who take delivery in the taxing state does not violate the Commerce Clause even though the purchaser immediatley takes or ships the goods to another state or country. *McGoldrick v. Compagnie Generale,* 309 U.S. 430; *Department*

of Treasury v. Wood Preserving Corp., 313 U.S. 62; *International Harvester Co. v. Department of Treasury*, 322 U.S. 340; *Pacific States Cast Iron Pipe Co. v. State Tax Commission*, (Utah) 369 P.2d 123, rev'd per curiam, 372 U.S. 605).

Appellant fails to make any mention whatsoever of these cases but simply assumes as a matter of fact that delivery took place outside California. In that respect, appellant ignores the stipulated fact that all deliveries were actually made within the territorial limits of California but bases its assumption on the rule that, for property tax purposes, the situs of a vessel engaged in commerce on the high seas is presumed to be at the vessel's port of registry, or "home port." (*Hays v. Pacific Mail Steamship Co.*, 17 How. 596) There is absolutely no authority whatsover for extending that fiction to sales tax cases so as to say that sales to vessels here in California really took place in some other state or country. As a matter of fact, in *Foppiano v. Speed*, 199 U.S. 501, this Court expressly rejected the argument that sales made on board a vessel were to be regarded as occurring where the vessel was registered.

Furthermore, it has been firmly established by this Court that the Commerce Clause does not prohibit the taxation of the sale simply because *the subject of the sale* (here bunker fuel) is to be used by the purchaser in conjunction with its interstate or foreign commerce business. Any burden imposed on interstate or foreign commerce by taxing the sale has been held to be too indirect and remote to warrant Commerce Clause protection. *Eastern Air Transport v. Tax Comm.*, 285 U.S. 147; *Nashville, C & St. L. Ry. v. Wallace*, 288 U.S. 249; *Edelman v. Boeing Air Transport*, 289 U.S. 249; *Southern Pac. Co. v. Gallagher*, 306 U.S. 167.

Appellant's attempt to raise a "multiple burden" argument must also fail. No other state or country has even attempted to tax the sales involved in this litigation (CT 22). Accordingly, no "multiple burden" can be said to exist.

It is not enough to show the possibility of multiple taxation. Actual "multiple burden" must be shown to exist (*General Motors v. Washington,* 377 U.S. 436; *Southern Pac. Co. v. Gallagher,* 306 U.S. 167, 172; *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450).

But even assuming, for the sake of argument, that appellant could raise the issue of "multiple burden" without the necessity of showing actual multiple taxation, appellant's argument would still fail for there is not even the remotest possibility of multiple taxation in this case. Any other state's attempt to tax these local California sales would violate both the Commerce Clause and the Due Process Clause (see *Freeman v. Hewit,* 329 U.S. 249; *Miller Bros. Co. v. Maryland,* 347 U.S. 340). The sales here involved were purely local California sales. It defies logic to argue that any other state could impose an excise tax upon appellant on the hypothesis that appellant made sales in that other state.

IV. The Federal Government Has Not "Occupied the Field" of Taxation of Local Retailers of Domestically Produced Bunker Fuel.

As its final attempt to avoid the California sales tax, appellant argues that Congress, in exercise of its power to regulate interstate and foreign commerce, has "occupied the field" of sales taxation of bunker fuel and impliedly prohibited such a state tax.

There is not now, and there never has been, any federal statute purporting to prohibit a state from imposing its

sales tax on local retailers of fuel. Appellant's arguments on "occupation of the field" and "preemption" are founded on the contention that Congress has impliedly (by silence on the subject) prohibited a state tax on local retailers of domestically produced bunker fuel. On that point, appellant bears a heavy burden, for prohibition by implication will not be lightly found. *Mintz v. Baldwin,* 289 U.S. 346, 350.

It is clear that Congress has not "occupied the field" so as to impliedly declare that states may not impose a sales tax on local retailers of domestically produced fuel. Although stating that this area has been the subject of a comprehensive pattern of federal regulation, appellant has failed to cite even one Congressional enactment dealing with the taxation or regulation of retailers of domestically produced bunker fuel. Appellant, however, places its reliance upon section 3451 of the 1939 Internal Revenue Code and the related customs duty drawback provision found in 19 U.S.C. 1309, together with the case of *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414.

Section 3451 of the Internal Revenue Code of 1939 granted an exemption to items sold as ship's stores from the taxes imposed under Chapter 29 of the Internal Revenue Code entitled "Manufacturers' Excise and Import Taxes." No tax was imposed by Chapter 29 on domestically produced bunker fuel whether sold as ship's stores or otherwise. The only tax imposed by chapter 29 which affected bunker fuel was the duty imposed by section 3422 on imported petroleum products. As far as bunker fuel was concerned, therefore, section 3451 did no more than grant an exemption from the tax imposed by section 3422.

Likewise, 19 U.S.C. 1309, being nothing more than a drawback provision relating to duties on imported petroleum, had nothing to do with domestic petroleum.

These two statutory provisions certainly do not constitute a comprehensive pattern of federal regulation of sales of bunker fuels to vessels. There is nothing in those statutes which either expressly or impliedly evidences an intent on the part of Congress to regulate in the area of taxation of sales of domestic bunker fuel. Nor is there any such indication in the case of *McGoldrick v. Gulf Oil Corp., supra.* In that case, the City of New York had imposed a sales tax on the purchaser of bunker fuel. The crude petroleum there involved was *imported* from Venezuela and was maintained in *United States government bonded manufacturing warehouses* where it was refined by the taxpayer into bunker fuel which it sold to vessels engaged in foreign commerce as fuel supplies. The taxpayer contested the validity of the tax. This Court considered the federal statutes exempting fuel supplies from customs duties and the federal statute exempting fuel supplies from the special tax on imported petroleum products and held, that considered together, those statutes evidence Congress' intent to regulate the foreign commerce involved in the importation, production and sale of foreign oil. *The foreign commerce found to be regulated by Congress was not the commerce carried on by the vessels which purchased the bunker fuel as ships' stores but the commerce carried on by the oil companies in bringing in foreign oil for refining in the United States under federal bond.* This Court stated:

> "Respondent rests its argument on different considerations growing out of the control over *the foreign commerce involved in the importation of the oil and its ultimate disposition as ships' stores* of vessels engaged in foreign commerce, which Congress has exercised in pursuance of a national policy with which, it is insisted, the tax conflicts. Expression of

> this policy, it is urged, is to be found in the statutes of the United States, read in light of their legislative history, exempting the imported oil from federal taxation, otherwise imposed, if it is sold for use as fuel on vessels engaged in the foreign trade, and in the measures taken in statutes and regulations to make that policy effective by segregating the oil under the direction of customs officers of the United States from the time of its importation until it is delivered to the purchasing vessel." (309 U.S. 423; Emphasis added.).

See also, 309 U.S. at 426 through 429.

This Court's reference to the Congressional Record for support for its holding that the purpose behind the Congressional provisions granting relief from import duties was to gain back for the oil companies the trade they lost by virtue of the initial enactment of those duties and taxes shows beyond question that the commerce carried on by the oil companies, not the commerce carried on by the vessels which purchased the fuel, was the "commerce" which the Court found Congress intended to regulate.

Once it is recognized that the "foreign commerce" regulated by Congress and discussed by this Court in the *Gulf Oil Corp.* case was the "commerce" engaged in by the oil companies in importing foreign crude oil for production in the United States, it becomes abundantly clear that the *Gulf Oil Corp.* decision is of absolutely no support to appellant in this case. Surely appellant, in producing, refining and selling domestic fuel in California, is not engaged in the "commerce" found to be regulated by Congress in the *Gulf Oil Corp.* case. It is apparent from a reading of the opinion in the *Gulf Oil* case that this Court carefully limited the application of this preemptive ruling

to imported bonded fuel. There is no support therein for appellant's assertion that this Court meant to say that it was holding that *all* types of bunker fuel are to be exempt from *all* state taxation.

CONCLUSION

The foregoing discussion demonstrates that there is no substantial federal question presented by this appeal. Thus, it is respectfully submitted that the appeal should be dismissed or, in the alternative, the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1966

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

Brief in Opposition to Motion to Dismiss or Affirm

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No. 863

In the Supreme Court of the United States

OCTOBER TERM 1966

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

Brief in Opposition to Motion to Dismiss or Affirm

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1. Appellees Err in Ignoring the Constitutional Purposes Underlying the Prohibition Against State Taxation of Exports in the Import-Export Clause. Appellees Also Fail to Provide any Answer to the Conflict Between the Courts of New York and California in Their Interpretations of the Import-Export Clause; The Conflict Exists and Should Be Resolved by This Court.

Appellees completely ignore appellant's detailed analysis of the history and purposes which underlie the constitutional prohibition against state taxation of exports. (Jurisdictional Statement, pp. 8-10). Appellees try instead to characterize the case of *Swan & Finch Co. v. United States*, 190 U.S. 143, 47 L.Ed. 984 (1903), as a constitutional authority resting upon the Import-Export Clause, and suggest that it governs this case. As pointed out in the Jurisdic-

tional Statement (p. 12), the *Swan & Finch Co.* case involved only a *statutory tax exemption* for the remission of an import duty. The Supreme Court there discussed the purposes of the statutory exemption, and properly based its decision upon these purposes. 190 U.S. at 146. Nowhere, however, did the Court analyze or even allude to the purposes of the *constitutional* prohibition against state taxation of exports, and therefore the decision is not an apposite precedent in this case.

In fact, Congress actually reversed the result produced by the *Swan & Finch Co.* case by subsequently providing (in Section 630 of the Internal Revenue Code of 1932, C. 96, 48 Stat. 256, now 26 U.S.C. 4221) that sales of fuel supplies for ships' stores "*shall be held to be exported.*" (Emphasis added).[1] If *Swan & Finch Co.* were a binding constitutional precedent, a mere congressional statute would not have been sufficient to overturn it; yet this Court found in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84 L.Ed. 840 (1940), that such action was within the legitimate province of Congress.

We should also point out parenthetically that the final decisions in *West India Oil Co. v. Sancho*, 108 F.2d 144 (5th Cir. 1939), *aff'd. on other grounds*, 311 U.S. 20, 85 L.Ed. 16 (1940), and *National Sugar Refining Co. v. United States*, 161 F. Supp. 606 (1958), specifically left open the question of interpretation of the Import-Export Clause. The California Supreme Court in this case recognized this fact, and these cases should not therefore be regarded as applicable precedents.

Equally groundless is appellees' further assertion that *Gulf Oil Corporation v. McGoldrick*, 281 N.Y. 647, 22 N.E.2d

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1. Ships' stores are also classified as exports under the Export Control Act, February 26, 1949, C. 11, 63 Stat. 7, (50 U.S.C. App. 2021 et seq.), and the current Federal Regulations, 15 C.F.R. 371.13.

480 (1939), *as modified*, 282 N.Y. 612, 25 N.E.2d 392 (1940),[2] is not a pertinent authority under the Import-Export Clause. The New York Court of Appeals there stated unequivocally that it was deciding the case, *inter alia*, under "Article I, Section 10, Clause 2 . . . of the United States Constitution, . . ." 282 N.Y. 612. Since the fuel oil there was first imported, processed in bond, and then re-exported as a ships' store, the New York Court of Appeals regarded it as immune from tax as *both an import and an export*. Certainly there is no basis for appellees' assertion that the New York Court of Appeals had in mind only imports. The lower appellate court, which was affirmed *per curiam* by the New York Court of Appeals, clearly viewed fuel oil sold as ships' stores as an "export." It stated:

> "We hold that it is a legitimate exercise of the power of Congress over foreign trade to provide for the segregation of imports so that they may be processed and *re-exported. It is also within the power of Congress reasonably to define the word 'exports' to include ships' stores.*" (Emphasis added). 256 App. Div. 207, 212, 9 N.Y.S.2d 544, 548 (1939).

Nothing in the opinion of the New York Court of Appeals suggests that it did not also view the fuel oil as an export.

2. Appellees Fail to Show That a Tax on Fuel Oil Sold to Vessels for Consumption While Engaged in Carrying Exports Is Not, in Economic Effect, a Prohibited Burden on the "Process of Exportation." They Propose an Incorrect Test Which Is Not Supported by Supreme Court Decisions.

Appellees err in attempting to restrict the constitutional protection of exportation only to those indirect taxes which are the equivalent of direct taxes on exports themselves.

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2. The unofficial citation of this case which appears at 25 N.E.2d 392 is incomplete. Reference is made to the Jurisdictional Statement, p. 8.

Such a test is too narrow and is not supported by the relevant authorities. In *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 (1827), the Supreme Court struck down a flat-fee occupation tax levied upon importers. It was not a tax upon the articles of import and it bore no relation to the volume or the value of the goods handled. In no manner was the tax the equivalent of a direct tax on any particular item of import or export. *If appellees' test were correct the tax would have been valid.* It was plain, however, that this was not the test applied by the Court. The Court objected to the tax because it was a burden which would ultimately and inescapably cause an increase in costs which the importer would either absorb himself or pass on to his customers. For this reason the Court rejected the tax as a burden on importation. *Brown v. Maryland, supra,* 12 Wheat. at 444. See also *Crew & Levick Co. v. Penn.,* 245 U.S. 292, 62 L.Ed. 295 (1917).

A further example of the incorrectness of appellees' contention is the case of *United States v. Hvoslef,* 237 U.S. 1, 59 L.Ed. 813 (1915), discussed at length in appellant's Jurisdictional Statement (pp. 15, 18). A tax on the sale of a lease for a complete ship, carrying a shipload of goods, cannot be logically tied to any particular item of cargo. Assignment of the burden of such a tax to each item of cargo would obviously be difficult. The Supreme Court did not boggle at this prospect; the tax was held to be a burden on exportation. (*United States v. Hvoslef, supra,* 237 U.S. at 17-18). The economic effect of a tax on the sale of fuel oil cannot be distinguished. See also *New York and C. Mail SS Co. v. United States,* 125 Fed. 320, *aff'd on this ground,* 200 U.S. 488, 50 L.Ed. 569, holding tax on manifests of cargo for foreign ports unconstitutional; and concurring opinion of Justice Douglas in *Joseph v. Carter and Weekes*

Stevedoring Co., 330 U.S. 422, 444-445, 91 L.Ed. 993 (1947), suggesting gross receipts tax on stevedoring activities in loading export cargo is part of "exporting process."

Appellees are also misguided in their citation of federal taxes which supposedly demonstrate that individual states may impose economic burdens on the "process of exportation." (Motion to Dismiss, pp. 14-15) The tonnage duties and "light money" duties on certain vessels entering the United States from foreign ports are expressly authorized by the United States Constitution. Article I, Section 8, Clauses 1 and 3. The individual states are, conversely, expressly denied this same power. Article I, Section 10, Clauses 2 and 3. The social security taxes, also mentioned by appellees, derive from the power given to the Federal Government by the Constitution to regulate and to tax foreign commerce. Article I, Section 8, Clause 3. The states have no such power and they may not claim co-extensive power to tax. *E.g., Joseph v. Carter and Weekes Stevedoring Co., supra.*

3. Appellees Fail to Meet Appellant's Contention That Sales of Fuel Oil to Vessels Registered Outside California Are Exposed to Multiple Burdens and That These Sales May Not Therefore Be Taxed by California.

In the Jurisdictional Statement, appellant pointed out that delivery of fuel oil to vessels of foreign registry could, because of the "law of the flag doctrine," be subjected to taxation just as if the fuel had been delivered into the territory or jurisdiction of the state of registry. In view of this possibility, appellant contended that the sales of fuel oil to such vessels raised a unique opportunity for double taxation, and therefore the State of California should be prohibited from taxing the sale. (Jurisdictional Statement, pp. 19-21). Appellees offer no answer to this contention.

Without benefit of citation of authority, appellees do no more than contend in substance that appellants are wrong. (Motion to Dismiss, p. 17) Appellant's lengthy analysis of the authorities which establish that the state of the vessel's registry retains jurisdiction over the persons and property on board the vessel, including the power to tax, is in effect unanswered.

Appellees' citation of *Foppiano v. Speed,* 199 U.S. 501, 50 L.Ed. 288 (1905) is inapposite. The vessel involved there operated exclusively on inland waters, as distinguished from the high seas, and the case is therefore distinguishable. The "home port" doctrine of *Hays v. Pacific Mail SS Co.,* 58 U.S. (17 How.) 956, 15 L.Ed. 254 (1855), and the territorial extension idea underlying it, has never applied to vessels engaged only in interstate commerce over inland waters. Hence, appellees are inaccurate in suggesting that the *Foppiano* case has any bearing on taxation of sales made to vessels plying the high seas in either intercoastal or foreign commerce.

Appellees are again wrong in stating that a state tax is invalid under the Commerce Clause *only if* the tax is in fact duplicated in another state. Appellant anticipated this argument in its Jurisdictional Statement, and drew this Court's attention to the numerous Supreme Court authorities which are squarely in opposition to appellees' argument. (Jurisdictional Statement, pp. 20-21) These authorities, directly in point, are erroneously ignored by appellees.

4. Appellees Fail to Justify the Local Tax Discrimination Against Domestic Fuel Permitted by the Decision Below; This Discrimination Is Unwarranted and Should Be Reviewed by the Court.

The federal tax exemption statute construed in this case (26 U.S.C. 3451, cited in App. B, Jurisdictional Statement) was adopted by Congress for a clearly stated purpose, namely, to help domestic tradesmen compete with merchants in foreign countries in the ships' stores trade. (Jurisdictional Statement, pp. 23-24). This help was given by exempting local merchants from taxation which obviously did not burden foreign merchants. The tax exemption was general in its terms, extending to ships' stores of every variety. Nothing in its legislative history or its actual language lays any basis for an exclusion of domestically produced articles from its protection.

Appellees concede that under *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84-L.Ed. 840 (1939), imported fuel oil which is refined in bond and sold as ships' stores is immune from local taxation. They assert, however, that fuel of domestic origin is fair game for local taxation.

Appellees seek support for their argument that Congress intended this discriminatory treatment solely in the fact that there is no federal excise tax on domestically produced oil. They argue that the only commerce intended to be regulated by this federal exemption is "commerce carried on by the oil companies in bringing in foreign oil for refining in the United States under federal bond." (Motion to Dismiss, p. 20). This argument misconcieves the meaning of the statutory exemption. The exemption is not a fuel oil exemption; it is a ships' supplies exemption. If there were no federal excise tax on *any article sold for use as ships' supplies,* the argument might be valid; but there are now, and have been at all times since the adoption of the statute construed in the *Gulf Oil* case, federal excise taxes on com-

modities of domestic origin which constitute ships' supplies (*e.g.*, lubricating oil—Revenue Act of 1932, Sec. 601 (c)(1), C. 209, 47 Stat. 260, now 26 U.S.C. 4091). These are all exempt from federal tax when sold as ships' supplies (26 U.S.C. 4221 (a)(3)).

Nothing in the language of the statutes or the debates or reports of Congress on these statutes gives any support to an interpretation which requires discrimination against products of domestic manufacture, and common sense is certainly against it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SHELL OIL CO. *v.* STATE BOARD OF EQUALIZATION OF STATE OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 863. Decided February 27, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.